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Incorporating the third 2022 National Lecture on Administrative Law
by Emeritus Professor John McMillan AO

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Recent developments

Anne Thomas

Government releases final report on review of Commonwealth secrecy provisions

On 21 November 2023, the Commonwealth Attorney-General's Department released its final report on the review of Commonwealth secrecy provisions (875 in total, across 283 Commonwealth laws).

The review developed 11 recommendations to guide future work to:

- reduce the number of secrecy provisions;
- support a consistent approach to the framing of secrecy provisions;
- maintain essential protections for Commonwealth information; and
- respond to stakeholder concerns about the impact of secrecy provisions on press freedom.

The Australian Government has considered and accepted all 11 recommendations for key reforms, including:

- establishment of principles for framing secrecy offences, to guide the future development and consistency of secrecy laws across Commonwealth laws (Recommendation 1);
- repeal of specific secrecy offences and non-disclosure duties that the review identified as no longer being required (Recommendation 2);
- development of a new "self-contained" general secrecy offence for inclusion in pt 5.6 of the *Criminal Code Act* 1995 (Cth), to ensure Commonwealth officers and others with confidentiality obligations can be held to account for harm caused by breaching those obligations (Recommendation 3);
- improved protections for individuals providing information to royal commissions (Recommendation 7);
- development of protections for "public interest journalism" (Recommendations 8 and 9).

More information and the final report is available at Attorney-General's Department (Cth), "Review of secrecy provisions" (Web Page, 21 November 2023) <https://www.ag.gov.au/crime/publications/review-secrecy-provisions>.

***Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth)**

The *Migration Amendment (Bridging Visa Conditions) Act 2023* passed Parliament on 17 November 2023. The Act comes into effect on 18 November 2023.

This Act amends the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth) in response to the High Court's orders of 8 November 2023 in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (S28/2023). These amendments aim to ensure non-citizens for whom there is no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future and who are therefore not capable of being subject to immigration detention under ss 189(1) and 196(1) of the *Migration Act*, and who do not otherwise hold a visa, are subject to appropriate visa conditions on any bridging visa granted to them following release.

While the High Court has not yet handed down the reasons for its decision, non-citizens affected by the orders in *NZYQ* are being released from detention pending bridging visas. The purpose of the amending Act is to regularise a non-citizen's migration status pending their removal from Australia.

The Australian community reasonably expects that all non-citizens in Australia will obey Australia's laws.

The Australian community also expects that non-citizens who do not meet the requirements for migration to Australia will not undertake activities or engage in further criminal offending that harms the community and that could prejudice the Australian Government's ability to facilitate their removal from Australia.

As has been reported publicly, those persons being released as a result of the order in *NZYQ* include certain individuals with serious criminal histories.

The measures outlined in this amending Act are designed to complement and strengthen existing safeguards.

Specifically, the Act amends the *Migration Act* to include appropriate amendments to bridging visa conditions to protect the community, increase monitoring capabilities and reporting obligations, and secure ongoing engagement with the Department of Home Affairs. Other amendments to visa conditions include mandatory reporting obligations and discretionary curfew and monitoring requirements to be imposed on a case-by-case basis only where necessary to protect the safety of the community, and new criminal offences for failing to comply with these reporting and monitoring conditions.

These amendments are considered necessary as an immediate response following the High Court's order. However, further legislative amendment may be required once the High Court hands down its judgment.

Details of the Act and its passage can be accessed at "Migration Amendment (Bridging Visa Conditions) Bill 2023", *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7114>.

<https://minister.homeaffairs.gov.au/ClareONeil/Pages/legislation-in-response-to-nzyq-high-court-decision.aspx>

Next stage of public sector whistleblowing reform

The Australian Government has released a consultation paper on a second stage of reforms to further improve the public sector whistleblowing scheme.

These reforms complement priority amendments passed in June to the *Public Interest Disclosure Act 2013* (Cth), which ensured immediate improvements to the public sector whistleblower scheme were in place in time for the commencement of the National Anti-Corruption Commission.

These second-stage reforms will address the underlying complexity of the scheme and what steps can be taken to provide effective and accessible protections to public sector whistleblowers.

The Government is consulting on whether there is a need to establish a Whistleblower Protection Authority or Commissioner, the remaining recommendations from the Moss Review, as well as recommendations from other relevant reports and reviews.

The Government will examine the responses to these consultations to determine what reforms are required to ensure Australia has an effective and accessible scheme.

The consultation paper is available at Attorney-General's Department (Cth), "Public sector whistleblowing stage 2 reforms", *Citizen Space* (Web Page) <https://consultations.ag.gov.au/integrity/pswr-stage2/>.

Submissions on the paper close 22 December 2023.

<https://ministers.ag.gov.au/media-centre/next-stage-public-sector-whistleblowing-reform-16-11-2023>

Appointment of the Commonwealth Director of Public Prosecutions

The Commonwealth Attorney-General, the Hon Mark Dreyfus KC MP, has announced the appointment of Raelene Sharp KC as the Commonwealth Director of Public Prosecutions (CDPP).

Ms Sharp's five-year appointment will commence on 4 December 2023. She will fill the vacancy created by the appointment of the former CDPP, the Hon Justice Sarah McNaughton, as a judge of the Supreme Court of New South Wales.

Ms Sharp has been a Barrister at the Victorian Bar since 2010 and was appointed Senior Counsel in 2022. Ms Sharp has appeared for the CDPP in many complex and sensitive cases. She has broad public law experience, both as counsel in public law litigation and through her work with the Office of the Special Investigator and the then Australian Crime Commission.

The Office of the Commonwealth Director of Public Prosecutions is an independent prosecution service established by Parliament in 1984 to prosecute alleged offences against Commonwealth law. The CDPP operates independently of the Attorney-General and the political process.

We congratulate Ms Sharp on her appointment.

<https://ministers.ag.gov.au/media-centre/appointment-commonwealth-director-public-prosecutions-14-11-2023>

Government response to Robodebt Royal Commission

On 13 November 2023, the Australian Government tabled its response to the Robodebt Royal Commission.

The Government has agreed, or agreed in principle, to all 56 of the Royal Commission's recommendations as part of the ongoing work to restore faith, integrity and trust in government.

The Government is providing $22.1 million in new and additional funding over four years from 2023–24, and $4.8 million each year ongoing, to support implementation of the Commissioner's recommendations. This follows the announcement of an additional $228 million in funding for Services Australia in 2023–24 to improve frontline service delivery and $1 billion in additional funding for Services Australia since October 2022.

The Attorney-General's Department will also receive additional funding for the Office of Legal Services Coordination and the Office of Constitutional Law to improve how legal risk is identified and how legal advice is provided to Cabinet. Funding will also be provided to develop a legal framework to support automated decision-making in appropriate circumstances and in a manner that is consistent with the principles recommended by the Royal Commission.

The Government's response to the Robodebt Royal Commission can be accessed at "Government response to the Royal Commission into the Robodebt Scheme", *Department of the Prime Minister and Cabinet* (Web Page, 13 November 2023) <https://www.pmc.gov.au/resources/government-response-royal-commission-robodebt-scheme>.

<https://ministers.ag.gov.au/media-centre/government-response-robodebt-royal-commission-13-11-2023>

Digital statutory declarations to save Australians time and money

The *Statutory Declarations Amendment Act 2023* (Cth), which amends the *Statutory Declarations Act 1959* (Cth), passed Parliament on 9 November 2023. With the passage of this legislation, the use of digital execution, electronic signatures and video-link witnessing, introduced as a temporary measure during the COVID-19 pandemic, is now a permanent feature for the making of Commonwealth statutory declarations.

The Act will enable people to execute a statutory declaration digitally using the online platform myGov and the Australian Government's Digital ID (myGovID) from 1 January 2024.

Australians will continue to be able to execute statutory declarations through the traditional, paper-based method should they wish to do so.

All three methods will be an equally valid and legally effective form of Commonwealth statutory declaration.

The Government recognises that any digital option must have strong safeguards that protect against fraud and misuse of personal information.

The Act includes a range of provisions to ensure transparency and accountability, and a requirement for approved online platforms and identity services to demonstrate that they comply with privacy laws and have robust fraud and security arrangements.

The Act also prohibits approved online platforms from retaining copies of statutory declarations, noting that they can hold particularly sensitive personal information. There is also an annual reporting requirement to the Parliament on the operation of the online execution platform.

These important reforms will benefit all Australians seeking a more convenient, and efficient, statutory declaration process — particularly those in rural, remote and regional parts of Australia.

More about the Act and its passage can be found at "Statutory Declarations Amendment Bill 2023", *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7074>.

<https://ministers.ag.gov.au/media-centre/digital-statutory-declarations-save-australians-time-and-money-09-11-2023>

Independent review of the National Cooperative Scheme on Unexplained Wealth

Mr Andrew Cappie-Wood AO has been appointed by the Australian Government to provide an independent review of the National Cooperative Scheme on Unexplained Wealth (National Scheme).

The National Scheme allows participating jurisdictions to access information-gathering provisions under the *Proceeds of Crime Act 2002* (Cth) and improves information-sharing between the Commonwealth, states and territories in relation to unexplained wealth proceedings and organised crime investigations.

Confiscated proceeds of crime are shared equitably between Australian jurisdictions that contributed to joint investigations, encouraging further cooperation.

The review is required under the Act and will examine whether the National Scheme has facilitated greater cooperation between parties and whether legislative reforms are required.

Mr Cappie-Wood is the former Secretary of the NSW Department of Justice and has significant experience in leading, managing and providing strategic advice to government agencies.

<https://ministers.ag.gov.au/media-centre/independent-review-national-cooperative-scheme-unexplained-wealth-12-10-2023>

Appointment of additional members to the Administrative Appeals Tribunal

The Australian Government has appointed 93 additional members to the Administrative Appeals Tribunal (AAT) through a merit-based selection process.

The appointment of these members will assist the AAT address the existing backlog of cases, particularly in the Migration and Refugee Division. These appointments bring the total membership of the AAT to 358 members, with 209 full-time and 149 part-time members.

The additional members will be appointed for a fixed term of two years, with the majority assigned to the Migration and Refugee Division. There will also be several members assigned to the National Disability Insurance Scheme Division and the Social Services and Child Support Division. Some members will be assigned to more than one division.

The new members will commence between 9 October 2023 and 5 February 2024. All members appointed through this process will transition to the new administrative review body, the Administrative Review Tribunal, upon its commencement, for the remainder of their term.

The names of the appointed members can be found at Administrative Appeal Tribunal, “Table of statutory appointments” (as at 13 November 2023) <https://www.aat.gov.au/AAT/media/AAT/Files/Corporate/StatutoryAppointments.pdf>.

We congratulate the members on their appointments.

<https://ministers.ag.gov.au/media-centre/appointment-additional-members-administrative-appeals-tribunal-04-10-2023>

Albanese Government to strengthen privacy protections

On 28 September 2023, the Australian Government provided its response to the *Privacy Act Review Report 2022* handed down in February this year. (See Attorney-General's Department (Cth), *Privacy Act Review Report 2022* (Report, 16 February 2023) <https://www.ag.gov.au/rights-and-protections/publications/privacy-act-review-report>.)

The Government's response to the review agrees, or agrees in principle, with the majority of the review's proposals, including:

- giving individuals greater control over their privacy by requiring entities to seek informed consent about the handling of personal information;

- establishing stronger protections for children, including the introduction of a Children's Online Privacy Code;

- making entities accountable for handling individuals' information and enhancing requirements to keep information secure, including destroying data when it is no longer needed; and

- providing entities with greater clarity on how to protect individuals' privacy and simplifying their obligations when handling personal information on behalf of another entity.

The Government will work with the small business sector, as well as employer and employee representatives, on enhanced privacy protections for private sector employees and for small businesses.

The Government will build on legislation passed last year, the *Privacy Legislation Amendment (Enforcement and Other Measures) Act 2022* (Cth), which significantly increased penalties for repeated or serious privacy breaches and provided the Australian Information Commissioner with greater powers to address privacy breaches.

The Attorney-General's Department will conduct an impact analysis and continue to work with the community, business, media organisations and government agencies to inform the development of legislation and guidance material in this term of Parliament. The Government will also consider appropriate transition periods as part of the development of any legislation.

The Government's response can be accessed at Attorney-General's Department (Cth), "Government response to the Privacy Act Review Report" (Web Page, 28 September 2023) <https://www.ag.gov.au/rights-and-protections/publications/government-response-privacy-act-review-report>.

<https://ministers.ag.gov.au/media-centre/albanese-government-strengthen-privacy-protections-28-09-2023>

Appointment of the Independent National Security Legislation Monitor

The Australian Government has appointed Mr Jake Blight as the next Independent National Security Legislation Monitor (INSLM).

The INSLM was established by the Government in 2010 to provide independent review of the operation, effectiveness and implications of national security and counter-terrorism laws and to consider whether the laws contain appropriate protections for individual rights, remain proportionate to terrorism or national security threats, and remain necessary.

Mr Blight will be the fifth INSLM and the first full-time Monitor following a significant funding boost in the May 2023 Budget. The Government has provided $8.8 million over four years from 2023–24 to support a full-time INSLM and to increase the INSLM's staff to eight.

These extra resources will enable the INSLM to deal more efficiently with an increasing workload and respond to priority reviews including the review of espionage, foreign interference, sabotage and secrecy offences.

Mr Blight brings to the role extensive experience in legal practice and a wealth of expertise in national security law. Through his ten years' experience as the Deputy Inspector-General of Intelligence and Security, Mr Blight conducted oversight of Australia's intelligence agencies; he commences his new role with in-depth knowledge of national security law and operations.

Mr Blight's three-year full-time appointment will commence on 26 November 2023. Mr Blight will take over from the current INSLM, Mr Grant Donaldson SC.

For more information about the work of the INSLM, visit "About the INSLM", *Independent National Security Legislation Monitor* (Web Page) <https://www.inslm.gov.au/about>.

We congratulate Mr Blight on his appointment.

<https://ministers.ag.gov.au/media-centre/appointment-independent-national-security-legislation-monitor-14-09-2023>

New powers for Royal Commission into Defence and Veteran Suicide

The Parliament passed the *Royal Commissions Amendment (Private Sessions) Act 2023* (Cth) on 14 September 2023. This Act will enable more persons to participate in face-to-face private sessions for the Royal Commission into Defence and Veteran Suicide, which is required to report on its findings by 17 June 2024.

Previously, only a commissioner could hold a private session. The Act changes this by enabling a suitably qualified, experienced and appropriately senior staff member of the Defence and Veteran Suicide Royal Commission to be authorised as an "Assistant Commissioner" to conduct private sessions.

Since it commenced in July 2021, the Royal Commission into Defence and Veteran Suicide has carried out 535 private sessions with another 400 remaining to be done before the Commission reports.

These changes will also apply to all future royal commissions.

Details of the Act and its passage can be accessed at "Royal Commissions Amendment (Private Sessions Bill) 2023", *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7073>.

<https://ministers.ag.gov.au/media-centre/new-powers-royal-commission-defence-and-veteran-suicide-14-09-2023>

Supporting secure identity verification services

The Australian Government has introduced the Identity Verification Services Bill 2023 (Cth) and the Identity Verification Services (Consequential Amendment) Bill 2023 (Cth) into Parliament, to ensure identity verification services are secure and protect the privacy of Australians.

These Bills will help organisations to verify a person's identity in a way that is secure and private, and will put in place important safeguards and security measures to protect Australians online, including:

- secure systems in which information and communications must be encrypted and data breaches must be reported;

- limits on access so that industry and most government agencies can only access identity verification services for 1:1 matching for the purpose of verifying identity, with the consent of the individual;

- strong privacy protections including consent requirements, privacy impact assessments, complaint-handling and transparency about how information will be collected, used and disclosed; and

- penalties for government and industry organisations that do not comply with their obligations, including terminating access to identity verification services.

The measures in these Bills strike a balance between achieving fast and convenient identity verification and maintaining strong standards of privacy and security.

More information about these Bills can be found at "Identity Verification Services Bill 2023", *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7085>.

<https://ministers.ag.gov.au/media-centre/supporting-secure-identity-verification-services-13-09-2023>

Appointments to the Federal Court of Australia

Mr Christopher Horan KC and Mr Yaseen Shariff SC have been appointed as judges of the Federal Court of Australia. Mr Horan has been appointed to the Victorian registry of the Federal Court and commenced on 5 September 2023. Mr Shariff has been appointed to the New South Wales registry of the Federal Court and commenced on 7 September 2023.

We congratulate Mr Horan and Mr Shariff on their appointments.

<https://ministers.ag.gov.au/media-centre/appointments-federal-court-australia-01-09-2023>

Annual report highlights OAIC's work to uphold privacy and information access rights

The Office of the Australian Information Commissioner (OAIC) has released its annual report for 2022–2023.

The OAIC delivered work for the Australian community through unprecedented times in 2022–23 as millions of Australians were impacted by the biggest data breaches the country had experienced since the commencement of the Notifiable Data Breaches (NDB) scheme on 22 February 2018.

The Australian Information Commissioner and Privacy Commissioner, Angelene Falk, said the OAIC had sought to influence quality freedom of information (FOI) decision-making by providing guidance to government agencies and working with them to improve the system. However, the OAIC still requires sufficient resources to meet current demand and address backlogs.

This year, applications for Information Commissioner (IC) review of FOI decisions of agencies and ministers fell 16% to 1,647, a break in the significant increases of recent years, and FOI complaints fell 2% to 212.

The OAIC finalised 1,519 IC reviews in 2022–23, an increase of 10% compared to 2021–22. But of 2,004 IC reviews on hand as at 30 June, over half were more than 12 months old.

The OAIC performs an important privacy complaint-handling role for the community. In 2022–23, it received 34% more privacy complaints (3,402, a record number) than in 2021–22.

In a year in which data breaches were prominent, the OAIC received a 5% increase in notifications.

During 2022–23, the OAIC launched significant investigations into Optus, Medibank Private, Latitude Group and Australian Clinical Labs in relation to their data breaches. Investigations were also opened into the personal information–handling practices of retailers Bunnings and Kmart, focusing on the companies' use of facial recognition technology.

The OAIC continues to co-regulate the Consumer Data Right (CDR) with the Australian Competition and Consumer Commission. During 2022–23, the OAIC provided advice on: the privacy and confidentiality impacts of expanding the CDR to the non-bank lending sector; legislation to establish new functionality in the CDR to allow consumer-directed action and payment initiation; and new and amended data standards.

During the reporting period, the OAIC contributed to the Attorney-General's Department's review of the *Privacy Act 1988* (Cth). The Australian Government released its response to the review in September 2023 and legislation is expected in 2024 (see page 7 above).

The OAIC's *Annual Report 2022–23* can be accessed at "Annual report 2022–23", *Office of the Australian Information Commissioner* (Web Page, 19 October 2023) <https://www.oaic.gov.au/about-the-OAIC/our-corporate-information/oaic-annual-reports/annual-report-2022-23>.

<https://www.oaic.gov.au/newsroom/oaic-annual-report-highlights-oaics-work-to-uphold-privacy-and-information-access-rights>

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

On 28 September 2023, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability handed down its final report.

On 5 April 2019, the then Prime Minister, Scott Morrison, announced the establishment of the Royal Commission, which officially commenced its inquiry on 16 September 2019. The Royal Commission was chaired by the Hon Ronald Sackville AO KC. The terms of reference for the Royal Commission were broad and directed the Commission to inquire into:

(a) what governments, institutions and the community should do to prevent and better protect people with disability from experiencing violence, abuse, neglect and exploitation, having regard to the extent of violence, abuse, neglect and exploitation experienced by people with disability in all settings and contexts;

(b) what governments, institutions and the community should do to achieve best practice to encourage reporting of, and effective investigations of and responses to, violence against and abuse, neglect and exploitation of people with disability, including addressing failures in, and impediments to, reporting, investigating and responding to such conduct;

(c) what should be done to promote a more inclusive society that supports the independence of people with disability and their right to live free from violence, abuse, neglect and exploitation;

(d) any matter reasonably incidental to a matter referred to in paragraphs (a) to (c) or that is believed to be reasonably relevant to the inquiry.

The Royal Commission has made 222 recommendations on how to improve laws, policies, structures and practices to ensure a more inclusive and just society that supports the independence of people with disability and their right to live free from violence, abuse, neglect and exploitation.

The report and further information about the Royal Commission can be accessed at <https://disability.royalcommission.gov.au>.

Update: 100 days of the National Anti-Corruption Commission

Monday 9 October 2023 marked 100 days since the National Anti-Corruption Commission (NACC) commenced on 1 July 2023.

The NACC is an independent Commonwealth agency established to detect, investigate and report on serious or systemic corruption in the Commonwealth public sector. The NACC operates under the *National Anti-Corruption Commission Act 2022* (Cth), which defines the jurisdiction of the Commission and what is corrupt conduct.

The NACC can investigate:

- conduct of any person that adversely affects a public official's honest or impartial exercise of powers or performance of official duties;
- conduct of a public official that involves a breach of public trust;
- conduct of a public official that involves abuse of office;
- conduct of a public official or former public official that involves the misuse of documents or information they have gained in their capacity as a public official.

Public officials include ministers, parliamentarians and their staff, and staff members of Commonwealth agencies. Staff members of a Commonwealth agency include individuals employed by or engaged in assisting the agency and contracted service providers under Commonwealth contracts administered by the agency.

In the first 100 days of operation, the NACC has received 1,247 referrals, 710 of which were excluded from further inquiry because they did not involve a Commonwealth public official or did not raise a corruption issue. There are 173 currently under assessment.

The NACC has opened nine preliminary investigations to assist it decide whether there is a corruption issue that it should investigate further.

The NACC has opened three new investigations and continues to work on a further six active investigations inherited from the former Australian Commission for Law Enforcement Integrity.

More information about the NACC can be found at <https://www.nacc.gov.au>.

<https://www.nacc.gov.au/news-and-media/update-100-days-national-anti-corruption-commission>

Recent decisions

Provisions providing punitive powers to the executive are invalid

Benbrika v Minister for Home Affairs [2023] HCA 33

The applicant is an Algerian citizen. He arrived in Australian in 1989 and became an Australian citizen in 1998 by operation of s 15(1) of the *Australian Citizenship Act 1948* (Cth) (*Citizenship Act*). In 2008, following a trial by jury in the Supreme Court of Victoria, the applicant was convicted of three offences under pt 5.3 of the Commonwealth *Criminal Code*: intentionally being a member of a terrorist organisation, knowing that it was a terrorist organisation (s 102.3(1)); intentionally directing activities of a terrorist organisation, knowing it was a terrorist organisation (s 102.2(1)); and possessing a thing connected with preparation for a terrorist act, knowing of that connection (s 101.4(1)). The applicant was sentenced to imprisonment for 15 years in total, with a 12-year non-parole period. The sentence expired on 5 November 2020.

On 20 November 2020, the Minister for Home Affairs determined in writing, pursuant to s 36D(1) of the *Citizenship Act*, that the applicant ceased to be an Australian citizen. The applicant subsequently applied for revocation of that determination, pursuant to s 36H of that Act. No decision has been made by the Minister on that application.

The applicant brought the matter to the Federal Court in its original jurisdiction under s 39B of the *Judiciary Act 1903* (Cth). The matter was removed to the High Court by order under s 40 of that Act.

The sole issue before the High Court was whether s 36D of the *Citizenship Act* is invalid on the basis that it reposes in the Minister for Home Affairs the exclusively judicial function of punishing criminal guilt, contrary to Ch III of the *Constitution*. This question is a sequel to the decision in *Alexander v Minister for Home Affairs* (2022) 401 ALR 438, which concerned s 36B of the *Citizenship Act*. In that case, the High Court found s 36B was invalid.

The High Court in *Benbrika* handed down its decision on 1 November 2023 with a 6 to 1 majority. Chief Justice Kiefel, Gageler, Gleeson and Jagot JJ in a joint judgment, along with Edelman and Gordon JJ who produced separate judgments, found s 36D of the *Citizenship Act* invalid for reasons that it reposes in the Minister for Home Affairs the exclusively judicial function of punishing criminal guilt, such that the applicant was still an Australian citizen. Justice Steward was in dissent.

The majority held that s 36D was very similar to s 36B discussed in *Alexander*, in that it conferred a power on the Minister administering the *Citizenship Act* that can be exercised only by the Minister personally, without the need for the Minister to observe any requirement

for natural justice. The power conferred is the power to determine that a person ceases to be an Australian citizen, effective at the time the determination is made.

The plurality agreed (*Benbrika* [23]) with the Court in *Alexander* that the purpose of the power in s 36B and, in this case, s 36D, "can only be characterised as 'punitive' " (*Alexander* [120]), and as reiterated in the purpose statement in s 36A, as one of "[r]etribution … characteristic of punishment under the criminal law" (*Alexander* [82]). The plurality in *Benbrika* went on to find that in light of the decision in *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 76 CLR 1, it was clear that the effect of Ch III of the *Constitution* is to make the punishment of criminal conduct exclusively judicial even if that punishment is separated from the adjudication of the criminal guilt. As such, the Commonwealth Parliament cannot give any officer of the Commonwealth Executive any function of sentencing persons convicted by Ch III courts of offences against Commonwealth laws. Nor can it vest in any Commonwealth Executive any power to impose additional or further punishment on persons convicted by Ch III courts of offences against Commonwealth laws. Section 36D purported to vest such power to impose additional or further punishment in the Minister: *Benbrika* [41].

Justice Gordon noted the punitive nature of s 36D, in that the deprivation of nationality and citizenship imposes a profound detriment on the individual, being a permanent rupture of the relationship between individual and the state, involving the loss of fundamental rights of nationality and citizenship with immediate effect and permanently. Justice Gordon also noted the need for legal control of punishment, noting that a court is required to provide reasons for sentence, as one such means of control. Yet, under s 36D, the Minister is not obliged to provide reasons for decisions, and procedural fairness, which is an essential characteristic of a Ch III court, does not apply in relation to making a decision under s 36D, such that to accept the validity of s 36D would erode a key constitutional value underpinning the separation of judicial power: the judicial protection of liberty against incursions by the legislature or the executive: *Benbrika* [67].

Justice Edelman likewise determined that, like s 36B, s 36D is punitive and that the revocation of citizenship and associated denationalisation "is one of the harshest forms of punishment that could be imposed on a person": *Benbrika* [101].

Justice Steward, in dissent, held that cancellation of a person's citizenship is not an exercise of judicial power. Conviction of one of the offences listed in s 36D is not a sufficient basis for cancellation; rather, the Minister must be satisfied that the conviction demonstrates repudiation of allegiance to Australia, an objective denial of citizenship. As Steward J similarly held in *Alexander*, cancellation under s 36D is "*de jure* acknowledgement of something which has in fact already occurred: a person's rejection of membership of the Australian body politic", initiated by the person's own actions: *Benbrika* [157]. As such, a cancellation under s 36D is not a matter of punishment, and the provision is valid.

Jones v Commonwealth [2023] HCA 34

On 1 November 2023, the High Court also delivered its decision in *Jones v Commonwealth* [2023] HCA 34. The issue before the Court was whether s 34(2)(b)(ii) of the *Australian Citizenship Act 2007* (which provides for the revocation of Australian citizenship where the

person is convicted and sentenced to imprisonment for at least 12 months for an offence committed before becoming an Australian citizen) is invalid because either it is not supported by s 51(xix) of the *Constitution* or it reposes in the Minister the exclusively judicial function of punishing criminal guilt. The majority (with Gordon J in dissent) distinguished their reasoning in *Benbrika*, and found that the provision is valid as it provides for "an act or process of denaturalization", which is supported by the naturalisation limb of s 51(xix) of the *Constitution*. Moreover, the power it confers on the Minister to denaturalise an Australian citizen is not a power to punish criminal guilt and is not otherwise exclusively judicial because here it is for the purpose of protecting the integrity of the naturalisation process. The majority held that the effect of s 34(2)(b)(ii) is to permit what had been considered and done administratively to be reconsidered and undone administratively if at any time later a criminal conviction were to demonstrate the original decision to have been made on materially incorrect or incomplete information.

Amending Acts can alter the substantive law

Tapiki v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCAFC 167

The applicant is a citizen of New Zealand, who had arrived in Australia in April 1995. The applicant had not acquired Australian citizenship but had held various visas issued under the *Migration Act 1958* (Cth). On 29 October 2020, a decision was made by a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs to cancel the visa the applicant then held under s 501(3A) of the Act. At the time, the applicant was serving a custodial sentence, having been convicted and sentenced in the Local Court of New South Wales on 30 September 2020 to an aggregate term of 12 months' imprisonment for offences of affray and assault. The delegate was satisfied that the applicant did not pass the character test because he had a "substantial criminal record"; that is, the applicant had been sentenced to a term of imprisonment of 12 months or more as described in s 501(7)(c) of the Act.

The applicant made representations that the cancellation decision be revoked under s 501CA of the Act. A different delegate considered the representations and decided, on 15 February 2021, not to exercise the power under s 501CA to revoke the cancellation decision. The applicant applied for review of the decision in the Administrative Appeals Tribunal. The Tribunal affirmed the delegate's decision. The applicant's appeal to the Federal Court was dismissed. Before the Full Court of the Federal Court, the applicant argued that an aggregate sentence of 12 months' imprisonment does not involve being "sentenced to a term of imprisonment of 12 months or more" within the meaning of s 501(7)(c) of the Act.

While the Full Court's judgment was reserved, a differently constituted Full Court in *Pearson v Minister for Home Affairs* [2022] FCAFC 203 accepted the aggregate sentence point. *Pearson* was handed down on 22 December 2022, and the applicant was released from immigration detention the next day. On 14 February 2023, the Full Court applied *Pearson*, finding that the delegate had no power to make the cancellation decision.

On 17 February 2023 the *Migration Amendment (Aggregate Sentences) Act 2023* (Cth) (Amendment Act) commenced. The Amendment Act was introduced in response to the judgment in *Pearson*. The Amendment Act expressly validates things done before

its commencement which would otherwise be invalid on the ground that an aggregate sentence had been regarded as equivalent to a sentence for a single offence. Following the commencement of the Amendment Act on 8 March 2023, the applicant was taken back into immigration detention.

On 21 March 2023 the applicant commenced proceedings in the Federal Court by filing an originating application, seeking a declaration that the Amendment Act is invalid, habeas corpus and an order that he be released from detention.

The declaration of invalidity was sought on the grounds that the Amendment Act involved a usurpation of or interference with the judicial power of the Commonwealth or purported to exclude the entrenched jurisdiction of the High Court; and that the provisions effect an acquisition of the applicant's right to sue for false imprisonment otherwise than on just terms, contrary to s 51(xxxi) of the *Constitution*.

The Federal Court did not find the Amendment Act was invalid. The Court accepted that while vesting judicial power exclusively in the courts by Ch III of the *Constitution* entails that the Parliament cannot enact a law purporting to "direct the courts as to the manner and outcome of the exercise of their jurisdiction", it does not prevent legislation altering the substantive law, including alterations with retrospective effect, or affecting rights in issue in pending proceedings: *Tapiki* [23].

The Court applied *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, finding that, as in that case, *Pearson* was decided on the validity of a particular decision on the basis of the law "as it stood at the time of the Full Court's judgment", which meant that the Amendment Act did not alter, let alone dissolve or reverse, that judgment. Rather than purporting to declare what the law was at the time, the Amendment Act assumes that the *Pearson* matter was correctly decided. As such, the Amendment Act does not usurp or interfere with the exercise of judicial power.

The applicant also submitted that the Amendment Act had the effect of withdrawing or fettering the entrenched jurisdiction of the High Court under s 75(iii) and (v) of the *Constitution*. That is, the Amendment Act purports to validate decisions already made, rather than to authorise any new decision, and rights and causes of action in relation to the existing decisions in this case are merged. As such, judicial review and litigation concerning the detention of the applicant as a result of the cancellation decision are not available and the jurisdiction under s 75(iii) and (v) is thereby excluded.

The Court found that this argument was premised on a misunderstanding of "causes of action". Simply put, it was open to the applicant to commence new judicial review proceedings to the extent that the decision in issue before the court might be arguable to be set aside on other grounds that are different as a matter of substance: *Tapiki* [40]. As a result, it could not be said that the Amendment Act had the effect of withdrawal of, or a fetter on, the jurisdiction of the High Court under the *Constitution*.

The Court also rejected the applicant's argument that the Amendment Act purportedly extinguished his right to bring an action for damages for false imprisonment against the

Commonwealth, thereby effecting an acquisition of "property" within the meaning of s 52(xxxi) of the *Constitution*, as provided for in *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

The potential claim could only relate to the period between the handing down of the judgment in *Pearson* on 22 December 2022 and the applicant's release on 23 December 2022. The Court was not willing to assume that period of detention had become unlawful at the precise time the detaining officer became aware release was required; "a short period for completing paperwork, organising transport and so on may possibly be permitted": *Tapiki* [46]. In relation to there being "no just terms" for the acquisition, and the relevant section of the Amendment Act being invalid, the Court noted that s 3B of the *Migration Act* provided for just terms and was to be construed together with the Amendment Act in accordance with s 11B of the *Acts Interpretation Act 1901* (Cth). As such, if the Amendment Act acquires property of the applicant by extinguishing a cause of action, just terms are provided for that acquisition and it does not fall foul of s 51(xxxi) of the *Constitution*.

Administrative decisions may still validly require consideration of questions of law

Huynh v Attorney General (NSW) (No 2) [2023] NSWCA 268

On 19 November 2023 the New South Wales Court of Appeal handed down its decision, dismissing the appeal.

The applicant, following a jury trial, had been convicted on 9 June 2015 of an offence of conspiracy to import a commercial quantity of a border-controlled precursor drug (pseudoephedrine) with the intention that the substance would be used to manufacture a controlled drug, contrary to ss 11.5(1) and 307.11(1) of the *Criminal Code Act 1995* (NSW).

After exhausting all other available avenues for appeal, the applicant lodged an application for a post-appeal inquiry pursuant to ss 78 and 79 of the *Crimes (Appeal and Review) Act 2001* (NSW) (*CAR Act*). On 13 October 2020 Garling J, acting in a non-judicial capacity, dismissed the application, noting that the applicant had "done no more than raise issues that he had raised previously on appeal" such that it was open to Garling J to "refuse to consider the application": *Huynh* [11].

The applicant sought judicial review of Garling J's decision in the Court of Appeal on two grounds: (1) error of jurisdiction on the part of Garling J because his Honour determined the outcome of legal questions that were submitted as part of the applicant's s 78 application when he was performing an administrative and not judicial task; and (2) error of law in that Garling J did not apply the relevant principles regarding the applicant's defence not being put to the jury and how a conspiratorial agreement is properly proven when addressing the issues the applicant raised in the s 78 application.

As to the first ground, the Court of Appeal found that there was no jurisdictional error, as "it is not the case that a judge acting *persona designata* and performing an administrative function may not determine legal questions, and that it is beyond his or her jurisdiction to do so": *Huynh* [20]. The Court noted Kirk JA's decision in *Wojciechowska v Secretary, Department*

of Communities and Justice [2023] NSWCA 191, finding that a judge considering whether there is a doubt or question as to the convicted person's guilt within the meaning of s 79 of the *CAR Act* may need to consider questions of law in the course of their considerations, but that this is well within jurisdiction and does not amount to jurisdictional error: *Huynh* [21].

In regard to the second ground, the Court of Appeal also found that there was no error of law. The Court could find no reason for the suggestion that the applicant's defence had not been put to the jury. Moreover, as the applicant accepted before the Court that he had been properly convicted, the Court could not see how a "doubt or question as to the convicted person's guilt" within the meaning of s 79 of the *CAR Act* could have been entertained. Even if there were some aspects put to Garling J that were new or presented in a different way, the Court found that it simply did not follow that Garling J's decision was unreasonable, still less that it disclosed some error of law on the face of the record.

Lastly, in dismissing the appeal, the Court of Appeal noted that the procedure in the *CAR Act* "does not exist to supply a further avenue of appeal for matters that could have been raised at trial or, with leave, on appeal": *Huynh* [35].

Fifty years of the Ombudsman in Australia

*John McMillan AO**

This paper, together with those by the Hon Justice Stephen Gageler AC, Justice of the High Court of Australia and Emeritus Professor Robin Creyke AO,[1] examines the development of three major pillars of the Australian administrative law system — courts, tribunals and Ombudsman. My colleagues traced their themes through imagery. Justice Gageler explained the common law tradition in judicial review by reference — teasingly! — to four dimensional worms, doughnut holes, fig leaves, hedgehogs and terracotta camels. Professor Creyke used the title "From sewers to 'super' adjudicators" to trace the history of tribunals from Commissioners of Sewers, through dust disease and racing tribunals, to the present age of tribunal-mania.

The early history of the Ombudsman was equally a period of creative imagery. One memorable debate topic was whether the Ombudsman was a toothless tiger, or fly-swatter, rather than elephant catcher. The debate has since moved to new imagery — the Ombudsman as watchdog, and whether an effective watchdog is an occasional growler who unexpectedly bares its fangs and prowls menacingly. The other early debate topic that has faded is whether in Australia the title "Ombudsman" was misplaced as people would confuse it with "omnibus" and be disappointed that the office did not provide practical help in getting from A to B.

Those debates have moved on because the community is now more familiar with the notion of an ombudsman. There are a large number of ombudsman offices in Australia — a public sector ombudsman in each jurisdiction; industry ombudsman schemes for telecommunications, banking, energy and transport; specialist ombudsman offices for health, private health insurance, fair work practices, small business advocacy and public broadcasting complaints; and regular new proposals, such as that from the Australian Competition and Consumer Commission (ACCC) for a digital platform ombudsman scheme,[2] and from Australian education ministers for a national student ombudsman.[3]

We are equally familiar with the dispute resolution method that Ombudsman offices pioneered: a structured framework for complaint-handling. Not only do Australian Ombudsman offices collectively receive upward of half a million enquiries and complaints each year, internal and external complaint-handling procedures are routine in public and private sector areas of service delivery and community engagement. There is an Australian Standard on complaint management.[4] The importance attached to professional complaint-handling is reflected in

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1 Justice Stephen Gageler, "Administrative law within the common law tradition" (2023) 107 *AIAL Forum* 22; Robin Creyke, "From sewers to 'super' adjudicators: what next for tribunals?" (2023) 107 *AIAL Forum* 31.

2 Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (Report, June 2019).

3 Department of Education, *Draft Proposal: Addressing Gender-based Violence in Higher Education* (Draft Action Plan, November 2023).

4 Standards Australia, *Guidelines for Complaint Management in Organisations (ISO 10002: 2018, NEQ)* (AS 10002:2022, 25 March 2022).

three recent events — the Disability Royal Commission devoting a separate report volume to independent complaints and oversight;[5] the Victorian Premier's announcement that a Parliamentary Integrity Commission would be established to investigate public complaints about wrongdoing by Members of Parliament[6] and the National Anti-Corruption Commission (NACC) receiving 1,247 complaints and referrals in its first 100 days.[7]

After Scandinavia (led by Sweden in 1809), Oceania became the second world region to adopt the Ombudsman model, starting with New Zealand in 1962 and Western Australia in 1971.[8]

The institution has since flourished internationally, in all corners of the globe, crossing political and cultural boundaries, providing oversight of national and provincial levels of government and vital areas of essential service delivery. In the public sector alone there are now more than 200 independent offices in over 100 countries that are members of the International Ombudsman Institute.[9]

Fifty years of development in our region have thrown up a host of public law issues about the role, methods and constitutional location of the Ombudsman. I will discuss seven dimensions, starting with the impact of the Ombudsman, moving to controversies, litigation and parliamentary oversight, and ending with a few comments on the selection of an ombudsman.

Impact

The impact of the Ombudsman in Australia over 50 years can be seen in various ways.

One is durability. The public sector offices are still called the Ombudsman and operate in most jurisdictions under the statutes that established them.[10] The institution has not gone through the major rethink and restructure that many courts, tribunals and other oversight agencies have.

Structural changes have mostly been the addition of new functions and powers. An example is the compliance-auditing function of some agencies of periodically inspecting specific categories of records (such as telephone interception warrant records) to ensure that state coercive action is legally compliant.[11] Other new statutory functions include the audit of

5 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Independent Oversight and Complaint Mechanisms* (Final Report, Vol 11, September, 2023).

6 Parliamentary Integrity Commission Bill 2024 (Vic). This Bill is a response to a joint report of the Independent Broad-based Anti-Corruption Commission and the Victorian Ombudsman, *Operation Watts* (Report, July 2022).

7 National Anti-Corruption Commission, "Update: 100 days of the National Anti-Corruption Commission" (Media Alert, 9 October 2023). The Commission had received 1,953 by 19 November 2023.

8 For an excellent history of one of the Australian offices, see Fay Woodhouse, *Watchdog for the People: 50 Years of the Victorian Ombudsman 1973–2023* (Report, Victorian Ombudsman, 31 October 2023). The Commonwealth Ombudsman was established in 1976.

9 *International Ombudsman Institute* (Website) <www.theioi.org>.

10 The formal title of the WA Ombudsman is the Parliamentary Commissioner for Administrative Investigations: *Parliamentary Commissioner Act 1971* (WA) s 5(1).

11 *Telecommunications (Interception and Access) Act 1979* (Cth) s 83; *Surveillance Devices Act 2004* (Cth) s 55.

internal agency complaint-handling systems,[12] monitoring interaction between the National Disability Insurance Agency and participants,[13] oversighting public interest disclosure handling,[14] receiving notification of preventative detention orders,[15] and conducting mediation and conciliation between agencies and complainants.[16]

There are some unique and rather atypical Ombudsman functions, such as the child death review function in New South Wales and Western Australia,[17] coordination of the Official Visitor Programs in Tasmania,[18] and in the Commonwealth, payment of reparation to Australian Defence Force officers who have suffered workplace abuse.[19] These have become Ombudsman functions principally because they are delicate but required functions within government, and stakeholders overall felt more accepting of them being located with the Ombudsman.

Specialist Ombudsman roles are reflected in the numerous titles of some offices. The Commonwealth Ombudsman is also the Immigration Ombudsman, Law Enforcement Ombudsman, Defence Force Ombudsman, Private Health Insurance Ombudsman, Postal Industry Ombudsman, Overseas Students Ombudsman and VET Student Loans Ombudsman.[20] Similarly, the Tasmanian Ombudsman is the Energy Ombudsman, Health Complaints Commissioner and Custodial Inspector. Additional functions in Western Australia are the Charitable Trusts Commissioner and Chair of the State Records Commission.

Ombudsman offices have magnified their impact by reporting on systemic maladministration issues picked up in complaint-handling. Recent examples include reports on social housing, Aboriginal programs, political data harvesting, compulsory detention, and failures in road-user charging for electric vehicles.[21]

12 See, eg, *Ombudsman Act 1974* (NSW) s 25A; *Ombudsman Act 1973* (Vic) s 13D.

13 Commonwealth Ombudsman, *Investigation into the National Disability Insurance Agency's Preparation to Meet the Participant Service Guarantee* (Report No 2/2022, June 2022).

14 For example, *Public Interest Disclosures Act 2013* (Cth) s 7A; *Public Interest Disclosures Act 2022* (NSW) pt 6.

15 For example, *Criminal Code Act 1995* (Cth) sch 1 (*Criminal Code*) pt 5.3 div 105; *Terrorism (Community Protection) Act 2003* (Vic).

16 *Ombudsman Act 1973* (Vic) s 13G.

17 NSW Ombudsman, *NSW Child Death Review Team Annual Report 2023* (Report, 30 October 2023); Ombudsman Western Australian, *Annual Report 2022–23* (Report, 30 September 2023) 58–127.

18 Ombudsman Tasmania, *Annual Report 22–23* (Report, 31 October 2023) 59–61. The similar NSW program was administered by the NSW Ombudsman until it was transferred to the Health Care Complaints Commission.

19 Defence Force Ombudsman, *Defence Abuse Reparation Scheme: Insights and Observations* (Report, Commonwealth Ombudsman, October 2023).

20 These titles are separately listed in the *Ombudsman Act 1976* (Cth).

21 See, respectively, Victorian Ombudsman, *Investigation into Complaint Handling in the Victorian Social Housing Sector* (Report, July 2022); NSW Ombudsman, *OCHRE Review Report* (Report, 28 October 2019); Commonwealth Ombudsman, *Annual Report of the Commonwealth National Preventive Mechanism under the Optional Protocol to the Convention Against Torture (OPCAT): 1 July 2021 – 30 June 2022* (Report, January 2023); Ombudsman SA, "Own initiative enquiries concerning alleged data harvesting via hyperlinks contained in government resources under the former government" (Statement on Enquiries, 27 June 2022); Victorian Ombudsman, *Investigation into the Department of Transport and Planning's Implementation of the Zero and Low Emission Vehicle Charge* (Report, September 2023). The Victorian e-vehicle charge was later declared by the High Court to be an unconstitutional State excise duty in *Vanderstock v Victoria* [2023] HCA 30.

Ombudsman complaint experience is likewise captured in a large number of guidance manuals and fact sheets that explore complaint-handling generally, but also in specialist areas such as urban development, assisted boarding houses, crisis management and official misconduct.[22] Other Ombudsman guidance material covers administrative remedies, automated decision-making, apologising and public interest disclosures. This is supplemented by training and educational workshops conducted by some offices — nearly 200 in the last year by just the New South Wales Ombudsman and the Victorian Ombudsman.

A final notable point on impact is the stature of Australian Ombudsman work in the international arena. To give two examples: the current President of the International Ombudsman Institute is Chris Field, the WA Ombudsman; and the latest international anthology of ombudsman research is edited by two Australian academics, Matthew Groves and Anita Stuhmcke.[23]

Controversies

A second dimension of Ombudsman work that illustrates Australian developments is the occasional controversies their work has stirred. The institution of Ombudsman has been partially insulated against controversy by two design features: the jurisdiction does not extend to ministerial decisions, and the reporting powers are recommendatory rather than determinative. Controversy can nevertheless arise if Ombudsman work "pokes the bear" or, alternatively, if the Ombudsman is missing in action. The following three examples are illustrative.

The first example is an investigation I took over in New South Wales in 2015, called Operation Prospect. The NSW Government had asked the NSW Ombudsman to investigate an unresolved dispute about a joint NSW Crime Commission and NSW Police Force anti-corruption task force conducted more than 10 years earlier. Special powers and funding were given to the Ombudsman for this investigation.

Unresolved conflicts do not die easily, and this Ombudsman investigation initially fanned rather than quelled the controversy.[24] The four-year investigation faced two NSW Legislative Council inquiries; many of the 131 witnesses were legally represented; there was litigation to prevent the 960-page report being tabled in Parliament; pre-emptive action was taken by the Crime Commission to undermine the report and attack the Ombudsman personally; denunciation of the investigation came from the former Premier and Attorney-General who had asked the Ombudsman to investigate; and frequent media critiques were fed by all sides in the conflict.

The epilogue is that the report was tabled in 2017[25] and the controversy seems to have been forgotten or submerged. Indeed, my successor as NSW Ombudsman is now the Chief Commissioner of the Crime Commission.

22 See, eg, Victorian Ombudsman, *Good Practice Guide: Complaint Handling in a Crisis* (16 February 2023).

23 Matthew Groves and Anita Stuhmcke (eds), *The Ombudsman in the Modern State* (Hart Publishing, 2022). An earlier anthology was Marc Hertogh and Richard Kirkham (eds), *Research Handbook on the Ombudsman* (Edward Elgar, 2018).

24 See John McMillan AO, "Better government: learning from mistakes" (2018) 93 *AIAL Forum* 63, 66–8.

25 NSW Ombudsman, *Operation Prospect* (Report, 6 Vols, December 2016); *Operation Prospect: A Report on Developments* (Special Report, May 2017); *Operation Prospect: Second Report on Developments* (Special Report, December 2017).

A second, more recent, controversy in Victoria was the Ombudsman's investigation of two government actions during the COVID-19 pandemic: the lockdown of nine inner-Melbourne public housing towers,[26] and Victorian border closures that required a permit to enter Victoria.[27] The Ombudsman reports did not question the Victorian Government's response to the pandemic but were highly critical of how both policies were implemented. The tower lockdown was described as rushed, chaotic, distressing and contrary to human rights standards. The permit system was criticised as giving rise to decision-making that was inexplicable, unjust and inhumane.

The Victorian Government rejected the Ombudsman's criticism and the recommendation to acknowledge and apologise for the unjust outcomes — "We make no apology for saving lives" was the curt response. The Ombudsman has since reiterated that this was not the issue and that it is never too late to apologise, adding that governments seem comfortable about apologising for historical wrongs, but find it difficult to acknowledge or apologise for recent wrongs.[28] The Victorian Government has separately announced that it will pay $5 million in compensation to settle a class action brought by public housing tower residents.

I will add the personal observation that I think the Victorian reports display the Ombudsman institution at its finest.[29] In the eye of the storm — in this instance a global pandemic — the Ombudsman will hear from people who feel sidelined by the establishment. It is important they can trust the Ombudsman to be fearless, to make their voice heard and to continue to press their case.

The third controversy to note is the strong criticism of the Commonwealth Ombudsman by the Royal Commission into the Robodebt Scheme. The Commission said the Ombudsman was one of several institutional checks and balances that had been ineffective in impeding an illegal and unreliable debt-recovery program that harmed thousands of individuals.[30] The Commission's core criticism was that the Ombudsman failed to act on knowledge it had of doubts about the legality of the Robodebt scheme. This was displayed in several ways:[31]

- discussion of the legality issue was removed from two draft Ombudsman reports in the face of a contrary departmental view;

- the Ombudsman did not use its coercive information-gathering powers to go behind inadequate departmental responses;

- it did not use a special power in the *Ombudsman Act 1976* (Cth) to seek an advisory opinion from the Administrative Appeals Tribunal (AAT);

26 Victorian Ombudsman, *Investigation into the Detention and Treatment of Public Housing Residents Arising from a COVID-19 "Hard Lockdown" in July 2020* (Report, December 2020).
27 Victorian Ombudsman, *Investigation into Decision-making under the Victorian Border Crossing Permit Directions* (Report, December 2021).
28 Victorian Ombudsman, *Ombudsman's Recommendations — Fourth Report* (Report, September 2022) 5.
29 See also NSW Ombudsman, *2020 Hindsight: The First 12 Months of the COVID-19 Pandemic* (Special Report, 22 March 2021); NSW Ombudsman, *The COVID-19 Pandemic: Second Report* (Special Report, 7 September 2022).
30 *Royal Commission into the Robodebt Scheme* (Final Report, 7 July 2023) iii, 599.
31 Ibid ch 21.

- it allowed agencies to make track change suggestions on its draft investigation outline and report;

- it did not ensure the public record was corrected when the Minister and the department misrepresented the Ombudsman's findings.

Controversies of these kinds raise important questions for Ombudsman offices. At an operational level, practical questions arise about what issues to investigate, when to use formal investigation powers, and the timing and tone of public reporting. At a philosophical level, these controversies are a reminder of the need to strike a balance between working cooperatively with agencies, speaking out to highlight agency maladministration, and nurturing public confidence in the independence and professionalism of the office. There is no single equation for striking that balance, but it is a core challenge.

Litigation

Controversies can give rise to litigation — another dimension of Ombudsman developments. Judicial review actions are highly individualistic and may tell us little about broader trends. However, there are perhaps three discernible phases in the 100 or more actions brought against Ombudsman offices.[32]

In the first phase, occurring soon after the Ombudsman started in Australia, a series of Victorian Supreme Court decisions gave a narrow reading to the concept of "administrative action" that the Ombudsman could investigate. That phrase, it was held, did not facilitate Ombudsman investigation of prison overcrowding, trial delays or unauthorised action by prison officials.[33] The elusive distinction between "policy" and "administration" was seized on in some cases.[34] Another narrow reading in a Federal Court case was that an Ombudsman report could express opinions about criminal guilt, but could not describe those opinions as findings.[35]

A second and dominant phase that can be traced to a 1995 decision of the NSW Court of Appeal (Kirby P presiding) emphasised the breadth of the Ombudsman's investigatory role.[36] These cases favour an ample meaning being given to the Ombudsman's powers so as to support its important role of combating maladministration for the benefit of ordinary citizens. As noted in one case, the office is uniquely placed to shine the bright "lamp of scrutiny" on "otherwise dark places".[37]

32 See generally Anita Stuhmcke, "Ombudsman litigation: the relationship between the Australian Ombudsman and the courts" in Greg Weeks and Matthew Groves (eds), *Administrative Redress In and Out of the Courts* (Federation Press, 2019) ch 9.

33 *Booth v Dillon (No 2)* [1976] VR 434; *Glenister v Dillon* [1976] VR 550. See also *Booth v Dillon (No 3)* [1977] VR 143; *Glenister v Dillon (No 2)* [1977] VR 151.

34 See, eg, *Booth v Dillon (No 2)* [1976] VR 434; *City of Salisbury v Biganovsky* (1990) 54 SASR 117.

35 *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 134 ALR 238.

36 *Botany Council v Ombudsman* (1995) 37 NSWLR 357; *Anti-Discrimination Commissioner v Acting Ombudsman* [2002] TASSC 24.

37 *Kaldas v Barbour* [2016] NSWSC 1880, [50].

A third and current litigation phase is exploring how judicial review principles (including jurisdictional error) apply to the Ombudsman's reporting power. Courts have held that certiorari will not issue to quash an Ombudsman report that is recommendatory only and has no direct legal consequence or effect.[38] In short, there is no legal result to quash. At most, declaratory relief may be available to ensure compliance with the usual implied constraints such as the duty to accord procedural fairness during an investigation. Even then, account must be taken of the broadly expressed criteria for Ombudsman reporting and that parliamentary oversight may be an alternative to judicial scrutiny.

Some Ombudsman statutes constrain judicial review by expressly including a privative provision that limits judicial review of Ombudsman investigations to the grounds of excess of jurisdiction and bad faith.[39] The NSW Court of Appeal, in dismissing a challenge to the Ombudsman's Operation Prospect investigation, held that the privative provision in New South Wales must be given full effect to preclude general review for jurisdictional error.[40] The rationale was to allow the Ombudsman to investigate and report to Parliament, unencumbered by judicial review. However, the Court noted that an unresolved question was whether this result was compatible with the High Court decision in *Kirk v Industrial Relations Commission of New South Wales*[41] which held that a privative provision cannot deprive a state superior court of its supervisory jurisdiction to grant prerogative relief. The plaintiff in the Operation Prospect challenge sought High Court leave to appeal that point, but the matter was settled in the interim. In effect, the Ombudsman retained the benefit of the NSW Court of Appeal ruling.

In summary, there is irony in the fact that the Ombudsman has been urged to play an active role in criticising and exposing wrongful conduct, yet there are few enforceable legal constraints on that role because it is not coercive or determinative in nature.

The institutional setting for Ombudsman offices

The Ombudsman's relationship to courts is one aspect of its institutional setting. Another is its relationship to the Parliament.[42]

The two most common ways of establishing a formal relationship are through specialist parliamentary oversight committees, and by declaring the Ombudsman to be an independent officer of the Parliament.

38 *King v Ombudsman* [2020] SASCFC 90; *Kaldas v Barbour* [2017] NSWCA 275.
39 For example, *Ombudsman Act 1974* (NSW) s 35A.
40 *Kaldas v Barbour* [2017] NSWCA 275.
41 (2010) 239 CLR 531.
42 There is now a rich literature on the broader constitutional setting for watchdog/oversight agencies. See, eg, Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge University Press, 2021); Robert Hazell, Marcial Boo and Zachariah Pullar, *Parliament's Watchdogs: Independence and Accountability of Five Constitutional Regulators* (Report, Constitution Unit, University College London, July 2022); Alice Tilleard, "She will not be alright — the need for greater protection of integrity institutions" (2023) 108 *AIAL Forum* 124.

Examples of committees are the NSW Parliamentary Committee on the Ombudsman, the Law Enforcement Conduct Commission, the NSW Crime Commission, the South Australian Statutory Officers Committee, and the Victorian Integrity and Oversight Committee. The common role of the committees is to review the performance of statutory officers, and in some instances to be consulted on appointments, possibly with a veto power.

The Ombudsman is declared to be an independent officer of the Parliament in Victoria, Queensland and the Australian Capital Territory[43] (and the Western Australian Ombudsman is still formally titled the Parliamentary Commissioner for Administrative Investigations). The rationale for this parliamentary status is that the Ombudsman can help the Parliament to hold the government to account. Historically, it was debatable whether this formal relationship made a practical difference for the Ombudsman. The sceptical view is that it was important only if the members of a parliamentary committee took an interest at a particular time — yet their motivation was as likely to be political and not dependent on whether there was a formal constitutional relationship with the Ombudsman.

However, thinking on this issue is now shifting, driven principally by budgetary considerations. Reports in three states have observed that the independence of the Ombudsman and other integrity agencies is threatened by the current arrangement in which their annual funding is proposed by an executive government agency (typically the Premier's department).[44] This requires the oversight agency to report to the executive on its activities and outcomes, and to face the possibility of its funding proposals being submerged in the cut-and-thrust of annual departmental appropriation negotiations.

Alternative approaches that were explored in the three reports are for the oversight agency's budget to go through a specialist parliamentary committee or the Speaker of Parliament, or to be proposed by an independent statutory commission akin to a remuneration tribunal. Queensland is adopting the option of routing an annual budget bid prepared by the Ombudsman through a parliamentary committee that will prepare a report to which the Minister must respond.[45] New Zealand has long had a mechanism by which the Ombudsman's budget is formally proposed to the Parliament by the Speaker prior to the presentation of the Government's budget.

If a stronger link to Parliament is developed, the membership of the specialist parliamentary committee becomes a more important issue. A controversy arose in Victoria in 2023 when the Commissioner of the Independent Broad-based Anti-Corruption Commission (IBAC) alleged that Government appointees to the Parliamentary Integrity and Oversight Committee were

43 See, respectively, *Constitution Act 1975* (Vic) s 94E(1); *Ombudsman Act 2001* (Qld) s 11(2); *Ombudsman Act 1989* (ACT) s 4A.

44 Auditor-General (NSW), *The Effectiveness of the Financial Arrangements and Management Practices in Four Integrity Agencies* (Special Report, Audit Office of New South Wales, October 2020); Peter Coaldrake AO, *Let the Sunshine In: Review of Culture and Accountability in the Queensland Public Sector* (Final Report, 28 June 2022); Independent Broad-based Anti-corruption Commission, Victorian Ombudsman and Victorian Auditor-General's Office, *Budget Independence for Victoria's Independent Officers of Parliament* (Joint Report, October 2022).

45 Integrity and Other Legislation Amendment Bill 2023 (Qld), proposing to amend the *Ombudsman Act 2001* (Qld) to insert a new pt 8 div 4A "Funding proposals". The Victorian Ombudsman is required to submit a draft annual work plan to the Integrity and Oversight Committee: *Ombudsman Act 1973* (Vic) s 24B.

undermining the IBAC's work.[46] There were calls for committee membership to be controlled by Parliament rather than by Government. An example at the federal level is the legislative formula for appointment of members to the Parliamentary Joint Committee on the NACC: six of the twelve members are appointed by each of the House of Representatives and the Senate; six are to be Government members, four Opposition members, and two cross-bench members; and the Chair must be a Government member elected by the Committee.[47]

Yet another pathway to link statutory officers to the Parliament is by appointment of an independent inspector who can investigate complaints against statutory officers and report to the Parliament.[48] The most comprehensive model for such an office is the Victorian Inspectorate that monitors most of the State's integrity agencies, including the Ombudsman, the IBAC, the Auditor-General, the Information Commissioner, the Judicial Commission and the Public Interest Monitor.[49]

In other jurisdictions the inspector role is mostly confined to anti-corruption and integrity commissions. The Commonwealth has adopted this model for the NACC: there is both an Inspector of the NACC and a Parliamentary Joint Committee on the NACC.[50]

There is perhaps a stronger need for this independent arrangement for an anti-corruption commission than an Ombudsman. Two special risks posed by an anti-corruption commission are that it will itself be subverted by corruption, or that it may overreach and injure individuals under investigation, including through public hearings. The Ombudsman, by contrast, generally proceeds in private and goes no further than to make an advisory finding of maladministration.

An interesting anecdotal development in Victoria is that the Ombudsman has been publicly critical of the Victorian Inspectorate, saying that it is overreaching and interfering.[51] There was a similar breakdown in New South Wales between the Independent Commission Against Corruption and the Inspector, former Justice Levine.[52]

46 Royce Millar, "Integrity chiefs push for greater independence from state government", *The Age* (online, 6 April 2023) <https://www.theage.com.au/national/victoria/integrity-chiefs-push-for-greater-independence-from-state-government-20230404-p5cxuy.html>.

47 *National Anti-Corruption Commission Act 2022* (Cth) ss 172, 173.

48 The external oversight framework for Australian anti-corruption bodies is summarised in a Queensland report: *Commission of Inquiry relating to the Crime and Corruption Commission* (Report, 2022) Appendix E.

49 *Victorian Inspectorate Act 2011* (Vic).

50 *National Anti-Corruption Commission Act 2022* (Cth) pt 10 "Oversight of the National Anti-Corruption Commission".

51 Royce Millar, " 'Unmanageable conflict of interest': Ombudsman slams fellow integrity watchdog", *The Age* (online 1 April 2023) <https://www.theage.com.au/national/victoria/unmanageable-conflict-of-interest-ombudsman-slams-fellow-integrity-watchdog-20230331-p5cwy5.html>, reporting on a "Sensitive Private and Confidential" letter written by the Victorian Ombudsman to the Attorney-General; and Royce Millar, "Politicians don't like them. They don't like each other. Have our watchdogs gone astray?", *The Age* (online, 1 April 2023) <https://www.theage.com.au/national/victoria/politicians-don-t-like-them-they-don-t-like-each-other-have-our-watchdogs-gone-astray-20230331-p5cwye.html>.

52 Compare, eg, Office of the Inspector of the Independent Commission Against Corruption (NSW), "Operation 'Hale': *ICAC re Margaret Cuneen SC & Ors*" (Section 77A Report, 4 December 2015); Independent Commission Against Corruption (NSW), *Annual Report 2015–16* (Report, 2016) 44.

Comparison of public sector and industry ombudsman

I have dwelt primarily on the public sector Ombudsman, also known as the parliamentary Ombudsman. The following discussion is about industry ombudsman schemes.

There was initially a strained relationship between the parliamentary offices and industry ombudsman schemes.[53] The International Ombudsman Institute closed the door on industry membership, claiming the appropriate use of the title was for oversight offices established by statute that dealt with public sector maladministration and questions of accountability and integrity. The industry schemes were essentially concerned with consumer protection.

That perception and division gradually eroded. Some industry schemes grew out of parliamentary schemes, such as the telecommunications and utility Ombudsman; all offices share an interest in complaint-handling and responsiveness; and government itself prescribed that industry schemes should be accredited only if they met six hallowed benchmarks: accessibility, independence, fairness, accountability, efficiency and effectiveness.[54] The divide ended in our region with the formation 20 years ago of the Australian and New Zealand Ombudsman Association (ANZOA) to which most parliamentary and industry Ombudsman offices belong.

But the debate has moved to another interesting question: are industry ombudsman schemes better performers than parliamentary offices? That was an observation of the Productivity Commission in its 2014 report, *Access to Justice*.[55] It said that submissions to its inquiry generally saw industry schemes as better performers than government schemes. Their power to award financial compensation may be a factor, but they have also been described as more transparent and responsive to complainants.

My view is that the industry schemes do have several worthwhile features that warrant the attention of parliamentary offices.[56] They include:

- a governance structure that includes both industry and consumer representatives on the governing board;

- a clear and accessible rules framework that explains how the scheme is established, operates and resolves disputes;

- tighter controls around complaint timeframes and publication of outcomes;

53 John McMillan, "The integrity oversight network: titles, links and gaps" (2020) 100 *AIAL Forum* 130, 131–5.
54 Minister for Customs and Consumer Affairs (Cth), *Benchmarks for Industry-Based Dispute Resolution Schemes*. These were reissued in 2015 by the Minister for Small Business.
55 Productivity Commission, *Access to Justice Arrangements* (Report No 72, 2014) ch 9, 337, 339.
56 John McMillan, "Complaint handling effectiveness: what can we learn from industry-based ombudsmen schemes?" in Groves and Stuhmcke (eds) (n 23) ch 8.

- clearer rules for identifying and dealing with systemic issues and reporting serious concerns to government regulators; and

- periodic independent reviews of scheme performance and compliance with complaint-handling benchmarks.

I will make two comparative observations. One is that the Robodebt Royal Commission was strongly critical of the Commonwealth Ombudsman's office for not having a clear view on when it would use its formal powers to obtain agency documents and to refer disputed issues to the AAT for an advisory opinion.[57] An understandable view is that an Ombudsman should always stand ready to use its significant investigation and reporting powers conferred by statute.

The other is that independent review of parliamentary schemes is haphazard. An independent strategic review of the Queensland Ombudsman is required every five years, and an independence performance audit of the Victorian Ombudsman arranged by a parliamentary committee is required every four years.[58] The last parliamentary review of the Commonwealth Ombudsman occurred in 1991.[59] Across the board, there is nothing that compares to the protocol by which industry schemes are generally required every five years to appoint an independent person to conduct a public review of whether the scheme complies with the six accreditation benchmarks. In short, public sector oversight agencies could be better at holding the mirror up to themselves.

Use of Ombudsman title

Concern is periodically expressed that the proliferating use of the Ombudsman title will dilute its value and credibility. Members of the public must have confidence that a body that calls itself an Ombudsman is independent, can investigate consumer complaints, and has the powers and philosophy to do so impartially and fairly.

Support for controlling the use of the title was first expressed by the Law Council of Australia's Access to Justice Advisory Committee in 1994,[60] and reaffirmed by the Productivity Commission in 2014.[61] The cause was taken up by some Australian Ombudsman offices, including by me.[62] This culminated in a campaign launched by ANZOA in 2010 based around a policy statement that listed six "Essential criteria for describing a body as an Ombudsman".[63]

57 *Royal Commission into the Robodebt Scheme* (n 30) 589–90, 599.

58 *Ombudsman Act 2001* (Qld) s 83; *Ombudsman Act 1973* (Vic) s 24D. See Integrity and Oversight Committee, Parliament of Victoria, *Performance of the Victorian Integrity Agencies 2021/22: Focus on Witness Welfare* (Final Report, 6 October 2022).

59 Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Review of the Office of the Commonwealth Ombudsman* (Report, 1991).

60 Access to Justice Advisory Committee, Law Council of Australia, *Access to Justice: An Action Plan* (Report, 1994) 315.

61 Productivity Commission (n 55) 329.

62 John McMillan, "What's in a name? Use of the term 'Ombudsman' " (Speech, Australian and New Zealand Ombudsman Association, Melbourne, 22 April 2008), available on the Commonwealth Ombudsman website.

63 Australian and New Zealand Ombudsman Association (ANZOA), "Essential criteria for describing a body as an Ombudsman" (Policy Statement, 2010); see also ANZOA, "Six essential criteria" (Web Page) <https://www.anzoa.com.au/use-of-the-name/>.

Two jurisdictions have taken the added step of imposing legislative controls. In South Australia the title cannot be used to describe an internal agency complaint service.[64]

In New Zealand the *Ombudsman Act 1975* (NZ) required the consent of the Chief Ombudsman to use the title.[65] After initially granting consent to the Banking Ombudsman and an Insurance Ombudsman, the Chief Ombudsman effectively closed the door to new entrants. One unsuccessful applicant, Financial Services Complaints Ltd (FSCL), commenced litigation that spanned seven years.[66] The New Zealand Court of Appeal first held in 2018 that the Chief Ombudsman's policy on the exercise of the discretion to grant consent was too restrictive.[67] The Chief Ombudsman commenced a reconsideration process, which was interrupted by a subsequent ruling of the Court of Appeal in 2022 that only one rational outcome was possible — that FSCL be permitted to use the Ombudsman title by reason that it was indistinguishable from the Banking and Insurance Ombudsmen.[68] The Court took the exceptional step of substituting its decision for that of the Chief Ombudsman and declaring that FSCL was entitled to call itself an Ombudsman scheme.[69]

While the legal proceedings were underway the *Ombudsman Act 1975* (NZ) was amended in 2020 to provide that the Minister for Justice could exercise the same discretion as the Chief Ombudsman to grant consent to use the title — but only to a government agency.[70] The upshot, it seems, is that there will only ever be four New Zealand Ombudsman offices.

Standing back from those developments in an Australian setting, it is time to say that the ship has sailed. It is neither possible nor purposeful to try and halt further use of the title. The separate use of the title in the nine national jurisdictions reinforces the impossibility. The institution of Ombudsman now eludes classification; expansion and diversification will surely continue.

I contributed to that liberalising trend in 2022 in a report on complaint-handling by the Australian Broadcasting Commission (ABC) which recommended the ABC establish the office of ABC Ombudsman, which it did.[71] The report noted that broadcasters in Australia and internationally had established similarly titled units that were members of the International Organisation of News Ombudsman and Standards Editors. Those offices appear to play a valuable role in complaint investigation and upholding editorial standards.

That does not mean abandoning the nomenclature cause altogether. The report on the ABC stressed that the ABC should not establish the new office unless the appointment was made through a formal and advertised selection process, and was for a fixed term that was

64 *Ombudsman Act 1972* (SA) s 32.
65 *Ombudsman Act 1975* (NZ) s 28A.
66 Ric Stevens, "What's in a name? Court brings seven-year legal battle over the word 'ombudsman' to a close", *NZ Herald* (online, 16 June 2022) <https://www.nzherald.co.nz/business/whats-in-a-name-court-brings-seven-year-legal-battle-over-the-word-ombudsman-to-a-close/RGCMUVYLF7JSE277L7MZBV6IXA/>.
67 *Financial Services Complaints Ltd v Chief Ombudsman* [2018] 2 NZLR 884.
68 *Financial Services Complaints Ltd v Chief Ombudsman* [2022] NZCA 248.
69 Now calling itself "A Financial Ombudsman Service": see the FSCL website <https://fscl.org.nz>.
70 *Ombudsman Act 1975* (NZ) s 28A, sch 1.
71 John McMillan and Jim Carroll, *ABC Complaint Handling — Report of the Independent Review* (Report to the ABC Board, April 2022).

renewable once only, and the Ombudsman must have a direct reporting line to the ABC Board and the discretion to make public statements.

In short, the ANZOA criteria still have a valuable role to play in ensuring appropriate use of the title. A body should not be titled an Ombudsman just because it sounds good.

A related nomenclature debate that has never gained traction in Australia is the suggestion that the term "Ombudsman" is inappropriate because of its gender-specific connotation. Debate on that issue was largely quelled by the Swedish Ombudsman — the first Ombudsman office — which explained that Ombudsman is a gender-neutral term in the Swedish language. The other development to kill off the debate in most countries was the choice of American legislators to opt for a different title, "ombud"!

Appointment of an Ombudsman

The criteria and procedure for appointment of an Ombudsman is an important issue that probably received greater attention in the early years. A special and distinguishing feature is that both the position and the office have the same name. This personalises the office to a degree, certainly in the minds of those who complain to it. History suggests too that the identity of the office holder can markedly impact the style of the office, its messaging, how it uses its statutory investigation powers and the people who are attracted to work in the office.

Two critical decisions for government are the term of appointment and the career background of the Ombudsman appointee.

Term of appointment

Terms of appointment in Australia are commonly five to seven years. There are exceptions. The Victorian Ombudsman is appointed for a single non-renewable term of 10 years. The current WA Ombudsman was recently re-appointed to a fourth five-year term. Other Ombudsman appointees have held office for terms as long as 15 years in New South Wales and 22 years in South Australia.

It is futile to attempt to link the term of appointment to a person's effectiveness as Ombudsman. Some motor along steadily, others peak towards the end, and some become controversial but at unpredictable stages.

My personal view is that seven to eight years is a suitable term. It is long enough for the Ombudsman to make a difference — to become known and settled and to follow through on selected maladministration themes and projects. Weighing against a longer term is that a periodic change of Ombudsman can bring different experience and insight to the position and invigorate staff to raise fresh ideas. Another consideration is that, as terms lengthen, an unpopular Ombudsman stance can develop a long tail, or an Ombudsman's views will be typecast and privately disparaged by agencies.

Career background

There is no necessarily preferred background for an Ombudsman appointment. To draw on personal experience, my six predecessors in the Commonwealth Ombudsman role were two Australian National University law professors, the managing director of a national law firm, an ACOSS leader, the Chief Parliamentary Counsel, and the Inspector General of Intelligence and Security (who was also a long-time senior Defence officer). I thought the office benefited from that diversity of experience in law, public administration and community affairs.

Are appointments approached differently nowadays? The growth in size of Ombudsman offices, their varied functions, staffing complexity and technology challenges mean that greater emphasis is probably now given to the managerial skills and expertise of Ombudsman candidates. Five of the current eight Ombudsman office holders in Australia were directly appointed from government positions, and the three most recent Commonwealth Ombudsman appointees were Commonwealth deputy secretaries (though one had also been Banking Ombudsman).

I have high regard for all those appointees, whom I know and regard individually as experienced and talented people. My concern, rather, is diversity over time. Other considerations must also come into play. An appointee from outside government will ideally have the skills and disposition to run a large agency and the temperament not to stray into debilitating disputes. An appointee from inside government will ideally have the disposition to stand up to forceful agency heads and to stare down ministers. And all appointees, from within or outside, will ideally have a mindset that this is potentially their last career appointment, in government at least.

Conclusion

The institution of Ombudsman has evolved and strengthened in Australia over 50 years. The work of the office has been prominent and at times controversial. The office is well placed to provide consumer redress, improve public administration, protect human rights, boost integrity and enliven public law theory. May that impact continue.

The role of statutory interpretation in administrative law

*The Hon Justice Kristen Walker**

Sometimes I wonder if administrative law is just statutory interpretation. Of course it is not — the fact that we have a robust system of merits review, and that there can be judicial review of non-statutory decision-making, provides immediate proof that statutory interpretation cannot provide all the answers to all questions in administrative law. Nonetheless, it is clear that in the modern doctrine of judicial review of executive action, as developed by the High Court over the last 20 years or so, statutory interpretation has become the dominant mode of reasoning.

In this article, I explore the nature and significance of that development, discuss some aspects of statutory interpretation that have particular relevance for administrative law, and consider how we are to approach judicial review of non-statutory decision-making where there is no statute to interpret. It concludes with some remarks about the role that the intertwining of statutory interpretation and judicial review of administrative action plays in the maintenance of trust and confidence in government decision-making.

It is necessary at the outset to observe that executive decision-making is generally regarded as incorporating two distinct modes of executive power:

(a) power conferred on the executive by statute, and thus necessarily governed by the terms of the enabling statute; and

(b) executive power that is sourced from outside statute (from s 61 of the *Constitution*, s 64 of the *Constitution*, and/or the common law), and where there is generally no statute that governs the exercise of the power.

I also note that s 61 of the *Constitution*, which vests the executive power of the Commonwealth in the monarch, does not distinguish between the different sources of executive power. The sources have been described as follows:

(a) Commonwealth legislation;

(b) express or implied powers in the *Constitution* itself; and

(c) what is loosely described as the "common law".[1]

These sources may overlap and are not a neat, mutually exclusive taxonomy.

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1 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 214, [124] (Edelman J).

The development of the role of statutory interpretation and judicial review

The first question I want to address is why it is that Australian administrative law has taken the path that it has, towards near-convergence with statutory interpretation.

Prior to the present era, judicial review of administrative decision-making was regarded as the application of common law principles. So, for example, in 1985, in *Kioa v West*,[2] which can be regarded as the start of the modern jurisprudence on procedural fairness, Mason J explained the doctrine of procedural fairness as follows:

> The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.[3]

In contrast, Brennan J explained the doctrine of procedural fairness as follows:

> At base, the jurisdiction of a court judicially to review a decision made in the exercise of a statutory power on the ground that the decision-maker has not observed the principles of natural justice depends upon *the legislature's intention* that observance of the principles of natural justice is a condition of the valid exercise of the power … When the legislature creates certain powers, the courts presume that the legislature intends the principles of natural justice to be observed in their exercise in the absence of a clear contrary intention.[4]

What emerges from Brennan J's judgment in *Kioa v West* (and from some of his later judgments[5]) is a concern to ensure that courts do not stray into merits review — and the reason for that concern is to preserve the legitimacy of judicial review of executive action.

For the next couple of decades after *Kioa v West*, a debate took place within the High Court as to whether the source of the presumptive limitations on the exercise of statutory power was to be found in the common law or in statute. On one view, Brennan J's conception ultimately triumphed: the understanding of the source of the courts' powers to judicially review an exercise of statutory power as derived from the court's function of doing no more than enforcing the statutory limits on power is now the dominant conception of judicial review in Australia.

However, Justice Gageler, writing extra-curially in 2016, described the outcome of the competition between the common law and statutory conceptions as a draw.[6] In his view, the relevant limitation on executive power is to be found in both. That is because, in order to discern in the enabling legislation the relevant limits on executive power — express or implied — the courts must interpret the legislation. And the techniques they use for that task are common law techniques of statutory construction, of course along with statutory commands found in modern Acts Interpretation Acts. In other words, the common law continues to play an important role in judicial review of executive action.

2 (1985) 159 CLR 550.
3 Ibid 584.
4 Ibid 609 (emphasis added).
5 See, eg, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 37–8; *Walton v Gardiner* (1993) 177 CLR 378, 408; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).
6 Justice Stephen Gageler, "The intersection of the common law, statute law and notions of fairness" [2016] (March) *International Family Law* 15–20.

Although many statutes set out limits on the powers they confer on the executive, there is probably no statute that expressly sets out all of the limits on the powers it confers. Rather, many limits on executive power are implied; and the process of implication results, of course, from common law techniques of statutory interpretation. Indeed, two of our most significant grounds of judicial review — procedural fairness and review for unreasonableness or irrationality — are the product of common law presumptions about what parliaments do and do not intend. I say more about these below.

An important aspect of this continued role for the common law is that the common law is dynamic — it is capable of being, and is from time to time, developed and changed by judges. That is apparent in recent times in relation to judicial review for unreasonableness and the doctrine of materiality, also discussed below.

Rules of statutory interpretation

What then are the relevant rules of statutory interpretation? Rather than attempt to be comprehensive, I first cover the basics, and then focus on a few aspects of statutory interpretation that have particular significance in the approach to the scope of executive power and judicial review.

As we know, because the High Court has told us many times, the starting point in any exercise of statutory construction is the text of the provision. We must also finish with the text. However, the text is to be considered in light of its context and purpose.[7] Consideration of purpose, while developed as an aspect of common law techniques of statutory interpretation, is further reinforced by statutory commands, which require courts to prefer a construction that would promote the purpose underlying the Act over a construction that would not promote that purpose or object.[8]

In 2014, in *Thiess v Collector of Customs*, the High Court unanimously said that "[o]bjective discernment of statutory purpose is integral to contextual construction"[9] and that

> it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.[10]

However, the Court's approach to purpose has varied over time, and a "sympathetic and imaginative" approach to discovering purpose is not always adopted.

7 *SAS Trustee Corporation v Miles* (2018) 265 CLR 137, 149 [20] (Kiefel CJ, Bell and Nettle JJ); see also 157 [41] (Gageler J), 162–3 [64] (Edelman J). See also *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ) and the cases there cited at n 105.

8 See, eg, *Acts Interpretation Act 1901* (Cth) s 15AA; *Interpretation of Legislation Act 1984* (Vic) s 35(a).

9 (2014) 250 CLR 664, 672 [23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

10 *Cabell v Markham* (1945) 148 F (2d) 737, 739, quoted in *Thiess* (n 9) 672 [23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

Furthermore, as Gleeson CJ pointed out in *Carr v Western Australia*, legislation rarely pursues a single purpose at all costs.[11] And a purpose that is expressed in very general terms may simply not provide any useful guidance in respect of the point of construction under consideration. Thus purpose may not always provide a clear or definitive guide to the proper construction of the statute.

As for "context", that term can do a lot of work in the area of statutory interpretation. It most obviously includes the legislative context — that is, the section, division, part and Act in which the provision under consideration is found. But "context" may also include the legal and factual circumstances in which the provision was enacted. By legal circumstances, I mean the pre-existing common law and body of statute law. And the factual circumstances direct attention to the mischief to which the legislation was directed: what particular factual problem was occurring that warranted legislative intervention?

Context can also include the materials to which reference may be made in order to undertake the process of statutory construction. These can include extrinsic materials, such as law reform debates, parliamentary debates and other historical materials. But of course, legislative history and extrinsic materials cannot displace the meaning of the statutory text.[12]

Having touched on the basics, I now want to address four more specific topics or rules of statutory interpretation:

(a) the principle in *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia* (*Anthony Hordern*);[13]

(b) the implication of a standard of reasonableness or rationality;

(c) the implication of the duty to accord procedural fairness; and

(d) the implication of materiality.

Anthony Hordern

The principle in *Anthony Hordern* is one of my favourite principles, perhaps because Debbie Mortimer (now Chief Justice Mortimer), Richard Niall (now Justice Niall) and I used it to great effect in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (*Plaintiff M70*).[14] The principle can be stated relatively simply, as follows:

> When a statute confers both a general power, not subject to limitations and qualifications, and a special power, subject to limitations and qualifications, the general power cannot be exercised to do that which is the subject of the special power.[15]

11 (2007) 232 CLR 138, 143 [7].
12 *Commissioner of Taxation (Cth) v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).
13 (1932) 47 CLR 1 (*Anthony Hordern*).
14 (2011) 244 CLR 144. In addition to counsel mentioned above, Craig Lenehan (now SC), Elizabeth Bennett (now SC) and Matthew Albert were also in the counsel team for that matter.
15 *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672, 678–9 (Mason J, Barwick CJ

It has been quoted many times in the High Court and elsewhere.

The principle was further explained by the High Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (*Nystrom*):

> It must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power.[16]

This principle was significant in *Plaintiff M70* because there were two possible powers the executive had to remove our clients from Australia:

(a) a power to remove a person to a regional processing country under s 198A of the *Migration Act 1958* (Cth); and

(b) a general power — in fact a duty — to remove an unlawful non-citizen, unconstrained by the place to which they were to be removed, found in s 198 of the *Migration Act*.

Thus we not only had to succeed in defeating s 198A as a source of power, we also had to succeed in defeating s 198 as an alternative source.

As is now well-known, we succeeded. The High Court, applying *Anthony Hordern* and *Nystrom*, held that a person seeking asylum whose claim had not been determined in Australia could *only* be removed from Australia pursuant to s 198A — they could not be removed under s 198.

And, importantly, the Court held that s 198A did not authorise our clients' removal because the Minister's declaration of Malaysia as a country for removal under that section was invalid, again by reason of the application of common law principles of statutory interpretation.

Plaintiff M70 is a high-profile example of the application of *Anthony Hordern*. But I draw this principle to your attention because it is relatively common for a statute to contain one or more general powers, cast in broad terms, as well as more specific powers, to which conditions or limitations are attached. The principle assists in resolving how to approach the construction of such provisions. Once stated, it might seem obvious. But it can be overlooked.

However, it is important not to apply this principle mechanically, in every case in which there is a more general power and a more specific power. Because there are occasions where the High Court has adopted a more nuanced approach, and declined to apply the principle.[17]

agreeing at 674, Aickin J agreeing at 680); see also *Anthony Hordern* (n 13) 7 (Gavan Duffy CJ and Dixon JJ).

16 (2006) 228 CLR 566, 589 [59] (Gummow and Hayne JJ).

17 See, eg, *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270, concerning the statutory power in s 439A of the *Corporations Act 2001* (Cth) for a court to extend the convening period for a creditors' meeting, and a more general power in s 447A for a court to make "such order as it thinks fit" about the operation of pt 5.3A of the Act (in which both provisions were found). The High Court permitted the invocation of the s 447A power, even where the statutory limitations upon the exercise of the s 439A power were not met.

Ultimately, whether the *Anthony Hordern* principle applies will require consideration of the text, context and purpose of the statute to ascertain whether the legislature intended that the specific power precludes recourse to the general power.

The implication of a standard of reasonableness / rationality

The second topic is the presumption that the legislature does not intend a statutory power to be exercised unreasonably.

No Australian Parliament has, to my knowledge, sought to say expressly that a power it confers on the executive can be exercised unreasonably. But it is relevant to note that in Israel a Bill to prevent the courts — and in particular the Supreme Court of Israel — from invalidating government decisions on the basis of unreasonableness was passed in mid 2023.[18]

In Australia, at least theoretically, it would appear to be possible for this presumption to be displaced by clear words — that is, Parliament could state that a particular power can be exercised unreasonably. Ultimately, it seems that to date in Australia political constraints have been sufficient to prevent that from occurring. But events in Israel are a reminder that that might not always be so.

The other point to make about this implication is that the concept of when a decision is unreasonable is subject to development and change by the courts.

Historically, there was a very high threshold before a court would quash a decision for unreasonableness, namely the standard of *Wednesbury* unreasonableness: a decision so unreasonable that no reasonable person could have reached it;[19] a decision that is "arbitrary" or "manifestly absurd". More recently, however, the High Court's decision in *Minister for Immigration and Citizenship v Li* (*Li*)[20] has suggested a relaxation of the strictness of *Wednesbury* unreasonableness. That decision also suggested that proportionality has a role to play in assessing reasonableness.

In terms of the role of proportionality in determining unreasonableness, the different judgments in *Li* took somewhat different approaches. Justice Gageler did not deal with proportionality at all. Chief Justice French adverted to it in passing, but did not engage in any analysis. However, the joint judgment of Hayne, Kiefel and Bell JJ engaged in a greater discussion of proportionality,[21] suggesting that the matter could have been (but was not) approached on the following basis:

> In the present case, regard might be had to the scope and purpose of the power to adjourn in [*Migration Act*] s 363(1)(b), as connected to the purpose of s 360(1). With that in mind, consideration could be given to whether the Tribunal gave excessive weight — more than was reasonably necessary — to the fact that Ms Li had had an opportunity to present her case. So understood, an obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached.[22]

18 Reuters, "Israel's parliament ratifies contested law limiting Supreme Court powers, sparking protests", *ABC News* (online, 24 July 2023) <https://www.abc.net.au/news/2023-07-24/apn-israel-ratifies-court-powers-law/102642466>.

19 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230.

20 (2013) 249 CLR 332 (*Li*).

21 Ibid 365 [72], 366 [74] (Hayne, Kiefel and Bell JJ).

22 Ibid 366 [74].

Thus the joint judgment linked proportionality to the reasoning process, by reference to weight.

The implication of procedural fairness

The third issue is the implication of a duty of procedural fairness.

As I touched on earlier, it is presumed that when a Parliament confers on the executive a power to affect the rights, duties or interests (but no longer the legitimate expectations) of a person, it intends that the executive will observe the principles of natural justice, which take their content from common law conceptions of procedural fairness. That presumption again can be displaced — and has been on many occasions, although often the common law principles are replaced by a "code" of statutory principles, rather than eschewed altogether. The *Migration Act* is a good example of codification.

Materiality

The fourth topic is the issue of materiality, which has been the subject of several recent High Court decisions, particularly in the context of procedural fairness. The decisions in question are *Minister for Immigration and Border Protection v SZMTA* (*SZMTA*),[23] *MZAPC v Minister for Immigration and Border Protection*[24] and *Nathanson v Minister for Home Affairs*.[25]

Materiality is the term used to refer to the question whether the error was one that could have made a difference to the decision that was in fact made. The question often posed is "was there a *realistic possibility* that the decision in fact made *could* have been different, had the error not been made?"

The concept of materiality is used as a mechanism to protect from invalidity decisions infected by some errors that might *usually* be regarded as jurisdictional errors. That is, an error that might usually be a jurisdictional error, but which in the particular case could not have made a difference to the decision that was in fact made, will not be a jurisdictional error. The concept can usefully be explained by reference to examples.

First example

Take in the first instance a hypothetical case where a decision-maker had a statutory power to grant a licence only if *two* conditions were satisfied — that the applicant was a fit and proper person, *and* that the applicant had an appropriate qualification. Assume that the decision-maker concluded that neither condition was satisfied. Assume that the conclusion that the applicant was not a fit and proper person was infected by a denial of procedural fairness. That would *usually* be a jurisdictional error.

23 (2019) 264 CLR 421 (*SZMTA*).
24 (2021) 273 CLR 506.
25 (2022) 403 ALR 398.

But if the other aspect of the decision — that the applicant lacked the necessary qualification — was not infected by any error, then the denial of procedural fairness could not have affected the ultimate decision. The decision-maker would have been required by the statute to refuse to grant the licence.

Thus the error, although *capable* of being a jurisdictional error, would not have been *material* — it could have made no difference to the outcome. The decision-maker would not have acted without jurisdiction if they made the only decision available to them.

This version of materiality is, I think, uncontroversial.

Second example

Take next a second example, where a decision-maker had a statutory power to grant a licence if *one* condition was satisfied — that the applicant was a fit and proper person — and that in reaching a conclusion on that question the decision-maker had before them information that was adverse to the applicant, and had not told the applicant that they had such information. Assume that was a breach of procedural fairness. However, assume also that the decision-maker had not taken that adverse information into account in reaching their decision. Rather, the decision was reached by relying on different factual material.

Recent decisions of the High Court tell us that such an error is not material. That is because logically, disclosure of such information could not have resulted in a different decision. Thus any correction or supplementation of that information, or any submissions about its relevance or its weight, would have had no impact on the decision. That is, there was no realistic possibility that the decision in fact made could have been different.

This form of materiality has been more controversial, and has split the members of the High Court.[26]

Third example

Take next an example where a decision-maker had a statutory power to grant a licence if one condition was satisfied — that the applicant was a fit and proper person — and that in reaching a conclusion on that question the decision-maker had before them information that was adverse to the applicant, and had not told the applicant that they had such information. Assume that was a breach of procedural fairness. Assume also that the decision-maker *had* taken that adverse information into account in reaching their decision.

In that context, the error would be material, because there was a realistic possibility that the decision in fact made could have been different. The applicant might have had additional information they could have placed before the decision-maker, or could have made submissions as to the weight to be given to the adverse information, that could have altered the outcome.

26 See, eg, *SZMTA* (n 23).

Importantly, in this final example, materiality does not require that the error *did in fact* make a difference to the outcome. It does not require the reviewing court to consider all of the evidence, and receive fresh evidence and submissions on the adverse material, and then decide whether, in its opinion, the decision would have been the same. That would require the reviewing court to enter the territory of the decision-maker, and stray beyond the bounds of judicial review.

Analysis

In each example, it is apparent that the exercise is backward looking: it involves considering the particular decision made by the decision-maker and asking whether, had the decision-maker not made the error they made, they could have come to a different decision. That involves a "counterfactual analysis".

As the plurality explained in *MZAPC*, the conceptual foundation for the requirement that an error be material in order to be jurisdictional in nature is the proposition that Parliament is not likely to have intended that a breach of a statutory condition that occasions no "practical injustice" will deprive a decision of statutory force. Rather, a statute conferring power on an administrative decision-maker will *ordinarily* be interpreted as incorporating a threshold of materiality in the event of non-compliance, at least in the absence of a legislative intention to the contrary.[27]

The focus on the statute is important. There are some conditions on power routinely implied into statutes conferring power on the executive that, by their very nature, incorporate an element of materiality. That is, there are some errors that are such that they will *always* be material; in such a case, there is no need to ask any separate question as to materiality. The plurality in *MZPAC* gave two examples:

(a) the "standard condition" that a decision-maker be free from actual or apprehended bias; and

(b) the "standard condition" that the ultimate decision that is made lie within the bounds of reasonableness.

In neither context, the plurality said, would any separate analysis of materiality be required.[28]

Having developed the doctrine of materiality in *SZMTA* and *MZPAC*, the High Court to some extent retreated from the full implications of it in *Nathanson*. In that case the Court emphasised that when determining whether the outcome *could have been different* had the relevant condition been complied with, the court was engaged in "reasonable conjecture within the parameters set by the historical facts".[29]

27 *MZAPC* (n 24) 521–2 [30]–[33] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
28 Ibid 522 [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
29 *Nathanson* (n 25) 410 [32] (Kiefel CJ, Keane and Gleeson JJ); see also 415–6 [55] (Gageler J), 422–3[83] (Gordon J).

Furthermore, the burden of proof in relation to the "historical facts" falls on the person challenging the decision. However, that burden will be relatively easy to discharge. The plurality said:

> There will generally be a realistic possibility that a decision-making process could have resulted in a different outcome if a party was denied an opportunity to present evidence or make submissions on an issue that required consideration. *The standard of "reasonable conjecture" is undemanding*.[30]

Justice Edelman went further and described the onus of proving materiality as "almost nothing".[31]

Materiality thus provides yet another example of the importance of statutory interpretation in judicial review, and of the dynamic common law principles relevant to that interpretation.

Review of non-statutory action

The focus on statutory interpretation in judicial review of executive decision-making then leads to a different, and more difficult, question: how are the courts to approach judicial review of non-statutory executive power?

Or, to put it differently, what are the limits on such powers that the courts can legitimately enforce? And where do those limits come from? And does the answer differ depending on the nature of the power in question?

The starting point for the analysis of judicial review of non-statutory exercises of executive power is, in my opinion, the proposition that the constitutional separation of powers requires that the courts be capable of determining the legality of any exercise of executive power.

Thus, as Mason J said in *R v Toohey; Ex parte Northern Land Council*,

> there is much to be said for the view ... that the exercise of a discretionary prerogative power "can be examined by the courts just as any other discretionary power which is vested in the executive". The question would then remain whether the exercise of a particular prerogative power is susceptible of review and on what grounds.[32]

That broad proposition might need to be subject to some qualification in relation to justiciability. But, assuming justiciability, the question then is, how are the courts to discover the legal limits on power, in the absence of a statute to provide those limits?

This could be the subject of a long paper of its own, but we have of course recently had some consideration of some of these questions by both the Full Court of the Federal Court and the High Court in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[33] to which I will come shortly.

30 Ibid 410 [33] (Kiefel CJ, Keane and Gleeson JJ) (emphasis added).
31 Ibid 425 [93].
32 (1981) 151 CLR 170, 220–1.
33 *Davis* (n 1).

Identification of the legal limits on a non-statutory power might depend on the source of that power. And that in turn will require us to ask whether we are speaking of the Commonwealth or the states. At the Commonwealth level, one might say all executive power is sourced in either s 61 or s 64 of the *Constitution*, as I indicated at the start of this article. And one might then interpret s 61 as containing an implication that the executive powers thus vested in the monarch are to be exercised reasonably. But that seems unsatisfying, because s 61 is in such brief and general terms. In short, s 61:

(a) does not define the concept of executive power;

(b) does not explain the sources from which the content of that power can be identified;

(c) does not identify any limits on executive power, or any basis for the implication of limits; and

(d) provides no framework by which the content of any limits — such as a standard of unreasonableness, for example — could be determined.[34]

And all of these things might vary, depending on the particular power or capacity under consideration.

Similarly, s 64 contains no detail about these matters.

It might, then, be relevant to assess the question of legal limits on the basis of the nature of the particular power in question. Is it a power traditionally referred to as a "prerogative power" — that is, a power traditionally recognised by the common law as a special power inhering in the executive, and vested in the monarch by s 61?

If that is so, then it would be logical and coherent for the common law to determine the limits of that power. And in that context, the common law might require that if the power is one that affects a persons' rights or interests, it includes a duty of procedural fairness. Or the common law might require that a particular non-statutory power be exercised reasonably (or, at least, not unreasonably).

On the other hand, if the power is a "capacity", akin to the capacity a natural person has, it is less clear why it would be subject to common law limits. One might say that all exercises of executive power must have a source in law, as the High Court recognised in *Pape v Federal Commission of Taxation*[35] and the *Williams v Commonwealth (No 2)*[36] cases. Thus to call a power a "capacity" does not foreclose the proposition that the common law will imply into such a power the same kinds of limitations as just discussed.

But the idea that the courts would undertake judicial review of government contracting decisions, for example, on reasonableness grounds may sound somewhat startling. Could

34 See discussion in ibid [119] (Edelman J).
35 (2009) 238 CLR 1.
36 (2014) 252 CLR 416.

the courts, for example, review the exercise of the Victorian Government's recent decision to cancel the Commonwealth Games, on the basis of unreasonableness? (I am assuming that decision was an exercise of the power to contract, and not the exercise of a statutory power, although I do not know the precise legal basis.) And in that regard, it is important bearing in mind that, at least in Victoria, there is no equivalent to s 61; thus, in my view, the common law pathway is probably clearer and more orthodox at the state level.

The other significant point always to bear in mind in relation to a non-statutory power is that it will necessarily be subject to modification, abrogation or limitation by statute. *Davis* provides a recent example of a non-statutory power butting up against the limits of statute.

Davis concerned s 351 of the *Migration Act*, which gave the Minister for Immigration the power to substitute a decision of the Administrative Appeals Tribunal with a decision that is more favourable to an applicant on the basis of the public interest. The power could only be exercised by the Minister personally, and the Minister had no duty to consider whether to exercise the power in respect of any decision.

Earlier cases, including *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (*Plaintiff S10*)[37] and *Minister for Immigration and Border Protection v SZSSJ* (*SZSSJ*),[38] had explained that s 351 embodied two distinct "decisions":

(a) a procedural decision as to whether to consider the exercise of the power; and

(b) a substantive decision as to whether to make the more favourable decision.

In 2016 the Minister issued guidelines (called "instructions") to assist with the resolution of such cases. The purpose of the 2016 guidelines was to:

(a) explain the circumstances in which the Minister may wish to consider intervening in a case;

(b) explain when the Department should refer a case to the Minister; and

(c) confirm that if a case does not meet these guidelines, the Minister does not wish to consider intervening in that case.

The 2016 guidelines said that the Minister will usually only consider the exercise of the public interest powers in cases with "unique or exceptional circumstances". Unique or exceptional circumstances included:

(a) compassionate circumstances;

(b) exceptional economic, scientific, cultural or other benefit to Australia; or

37 (2012) 246 CLR 636.
38 (2016) 259 CLR 180.

(c) circumstances in which the application of the legislation leads to unfair or unreasonable results.

Importantly, the 2016 guidelines directed the Department to "finalise cases" without referral to the Minister if the Department assessed the case as not having these unique or exceptional circumstances.[39]

These guidelines were similar to, but not the same as, guidelines that had been issued in 2009. The 2009 guidelines had been considered in *Plaintiff S10* and *SZSSJ*. In *Davis* the High Court explained their relationship to the statutory power in s 351 as follows:

> Being under no obligation to exercise the statutory power to make a procedural decision at all, however, the Minister can choose to make no procedural decision one way or the other under s 351(1). The Minister can instead choose to exercise executive power, involving the Minister acting in "a capacity which is neither a statutory nor a prerogative capacity", to give a non-statutory instruction to officers of the Department administered by the Minister under s 64 … as to the occasions, if any, on which the Minister wishes to be put in a position to consider making a procedural decision. Thus, the Minister can exercise executive power to give a non-statutory instruction to departmental officers to the effect that "I wish to be put in a position to consider making a procedural decision in any case that has the following characteristics ... but I do not wish to be put in a position to consider making a procedural decision in any case that has the following characteristics …".[40]

However, neither *Plaintiff S10* nor *SZSSJ* had addressed the question whether the permissible scope of such a non-statutory instruction was affected by the fact that the power could be exercised only by the Minister personally. That question squarely arose in *Davis*, where there had been a departmental decision to "finalise" Davis's case without referring it to the Minister for consideration. The Court declared that decision to have exceeded the executive power of the Commonwealth.[41]

In that regard, something should be said about the nature of the power the departmental officers had been exercising. As Edelman J observed:

> Some of the suggested formulations of that "power" resemble the bureaucratese of Sir Humphrey Appleby: a "procedural decision" by the officials to consider whether the Minister considered that he wished to consider the exercise of the "substantive power".[42]

A majority of the Court held that the 2016 guidelines transgressed the limits of the s 351 power. The power conferred by s 351(1) to make the procedural decision not to consider making a substantive decision in a class of case is not unbounded. Rather, it is bounded by the exclusivity that s 351(3) attaches to the power that s 351(1) confers on the Minister.[43] Justice Gordon observed that, if a statute regulates or controls how executive power is to be exercised, then the statute governs to the exclusion of any residual, non-statutory power.[44]

39 *Davis* (n 1) 222 [2] (Kiefel CJ, Gageler and Gleeson JJ).
40 Ibid 225 [19] (Kiefel CJ, Gageler and Gleeson JJ).
41 Ibid 227–8 [38] (Kiefel CJ, Gageler and Gleeson JJ), 238 [100] (Gordon J), 240 [114], 250 [171]–[172] (Edelman J), 274–5 [318]–[319] (Jagot J).
42 Ibid 239 [107].
43 Ibid [29] (Kiefel CJ, Gageler and Gleeson JJ), [97] (Gordon J), [147] (Edelman J), [293] (Jagot J).
44 Ibid 237 [96] (Gordon J), referring to *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 600–1 [279].

A Minister is, undoubtedly, *entitled to obtain non-statutory advice* and assistance from their department. But there are limits on that entitlement. As Edelman J helpfully explained, there are two categories of conduct:[45]

(a) permissible advice and assistance to the Minister so that the Minister can personally exercise the Minister's own liberty as to whether or not to consider the request; and

(b) an impermissible exercise by the officials themselves of the Minister's personal liberty.

The Court by majority held that the determination by departmental officers of cases assessed by them not to have unique or exceptional circumstances, without referral, fell into category (b): the Minister, in substance, had entrusted the evaluation of the public interest to departmental officers; but that was an evaluation *he* was required to undertake. The Minister thus exceeded the statutory limit on executive power imposed by s 351(3). Thus the terms of s 351 constrained the non-statutory power of a Minister to obtain advice and assistance from their department.[46]

Conclusion — enhancing trust

Does the present role of statutory interpretation in judicial review of executive action enhance trust in government decision-making? That is a difficult question to answer, in some abstract sense. And I am not aware of any surveys or polls that would reveal the answer.

It is probably trite to observe that the involvement of the courts in the supervision of the legality of government decision-making is, in and of itself, likely to enhance trust in government decision-making. (Or perhaps judges simply assume that.) And, taking that one step further, it is arguable that, by emphasising the statutory source of the limits on executive power that are (usually) being enforced by the courts, the courts emphasise the fundamentally democratic nature of their role in this area. A democratically elected Parliament has imposed limits on executive power, and the courts then simply give effect to the will of that democratically elected Parliament.

That understanding was reflected in the judgment of Brennan J in *Walton v Gardiner*,[47] where his Honour linked his judgments in *Kioa v West* and *Attorney-General (NSW) v Quin*[48] to Professor Wade's view that it is "legislative supremacy" that provides the justification for judicial review of executive action.[49] Justice Brennan quoted Professor Wade as follows:

> [I]n every case [the judge] must be able to demonstrate that he is carrying out the will of Parliament as expressed in the statute conferring the power. He is on safe ground only where he can show that the offending act is outside the power. The only way in which he can do this, in the absence of an express provision, is by finding an implied term or condition in the Act, violation of which then entails the condemnation of ultra vires.[50]

45 *Davis* (n 1) 239 [109].
46 Ibid 227–8 [38] (Kiefel CJ, Gageler and Gleeson JJ; Gordon J agreeing at 231 [66]), 249–50 [170]–[172] (Edelman J), 264 [254] (Jagot J).
47 *Walton* (n 5).
48 (1990) 170 CLR 1.
49 *Walton* (n 5) 408.
50 Ibid.

But I confess that, at some level, that seems too superficial and unpersuasive. Perhaps that is because I am a former Mason associate, and find more persuasive Sir Anthony's insights into the basis for judicial supervision of executive action. But I note that I am not alone in thinking this. It has been said by other prominent judges and commentators, including Justice Gageler,[51] Justice Beazley,[52] and Will Bateman and Leighton McDonald,[53] to name a few.

This turn to statutory interpretation, it seems to me, fails to recognise the role of the judge in the development of the common law rules of statutory interpretation. Recent examples of that important role can be seen in developments concerning the standard of unreasonableness to incorporate proportionality and in the recent development of materiality.

It also fails to reflect the ongoing tensions between the Parliament and the courts about judicial review of executive action, which have led to greater and greater legislative efforts to exclude the courts or to limit and minimise their role. The plethora of privative clauses and the legislative reaction to cases like *Plaintiff M70*, often enacted with bipartisan support, suggest that it is not really tenable to describe the courts as simply giving effect to the will of the democratically elected legislature.

Finally, the turn to statutory interpretation fails to recognise the role that values play in both statutory interpretation and judicial review. As Justice Beazley observed extra-judicially in 2018,

> subsumed within common law principles of statutory interpretation are values central to our system of government, including our system of law. Accordingly, where courts are faced with issues of judicial review that turn upon statutory interpretation, even in the absence of any express consideration of the underlying rationale of judicial review, the very application of the common law principles gives effect to notions of the rule of law.[54]

It is, I want to suggest, the presence of common law and constitutional values, particularly the rule of law, that ultimately provides a basis for an argument that judicial review enhances trust in government decision-making.

51 Justice Stephen Gageler, "The underpinnings of judicial review of administrative action: common law or constitution?" (2000) 28(2) *Federal Law Review* 303, 311–12.

52 Justice MJ Beazley, "Administrative law and statutory interpretation: room for the rule of law?" (2018) 93 *AIAL Forum* 1, 7.

53 Will Bateman and Leighton McDonald, "The normative structure of Australian administrative law" (2017) 45 *Federal Law Review* 153, 173–9.

54 Beazley (n 52) 10.

Protecting vulnerable members of the community through administrative law mechanisms

*Rosalind Croucher AM**

This article considers protection of vulnerable members of the community through the administrative law mechanisms at hand at the Australian Human Rights Commission (AHRC or Commission) and the recommendations the Commission has made to improve them with the introduction of a federal Human Rights Act based on the model the Commission proposed in March 2023. In this context, the concept of "administrative law mechanisms" embraces the work of the Commission's complaint-handling jurisdictions within its ambit, particularly those aspects which are focused squarely on public authorities. The article uses two illustrations: the design and interpretation of the *Migration Act 1958* (Cth), and the experience of royal commissions, particularly the Royal Commission into the Robodebt Scheme.

The Australian Human Rights Commission

Australia's ratification of the *International Covenant on Civil and Political Rights* (*ICCPR*)[1] on 13 August 1980 provided the catalyst for the establishment of the first iteration of the present Commission, in 1981, as the "Human Rights Commission", under the *Human Rights Commission Act 1981* (Cth) (the 1981 Act) introduced by the government of the Hon Malcolm Fraser MP.[2] The Prime Minister said that the establishment of the Commission represented a "unique approach" to issues of human rights, with the capacity to make an "innovative contribution to the advancement of rights in Australia".[3] Its functions and powers, he said, were based "four square upon the fundamental realities of the acceptance and development of human rights in civilised communities".[4]

In addition to dealing with complaints under the *Racial Discrimination Act 1975* (Cth) (*RDA*), which were brought into the new Commission's jurisdiction, the Commission could inquire into "any act or practice that may be inconsistent with or contrary to any human right".[5] Hence the name of the new body as the "Human Rights Commission". While the *RDA* covered some aspects of "human rights" as unlawful discrimination, this new limb added a *generic description* of matters that could be brought to the Commission. "Act or practice" was

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1 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

2 The first annual report of the Human Rights Commission stated: "The process commenced in 1977 when a Bill was introduced which lapsed with the dissolution of Parliament in that year. A further Bill was introduced in 1979, but it became the subject of considerable controversy and conflict between the Senate and the House. It was different from the 1977 Bill principally in that provision was made for processes of conciliation to be undertaken in association with the investigation of complaints. The 1981 Bill, which finally emerged as the *Human Rights Commission Act 1981* (Cth), was in most respects the same as the 1979 Bill. However, three further international instruments with significant implications for important groups in the community were annexed as schedules in addition to the ICCPR." See Human Rights Commission, *Annual Report 1981–82* (Report, 1982), vol 1, 4.

3 Human Rights Commission, *Annual Report, 1981–82* (n 2) 4.

4 Ibid 5.

5 *Human Rights Commission Act 1981* (Cth) s 9(1)(b).

defined principally as an act or practice by or on behalf of the Commonwealth — the familiar executive targets of administrative law.[6] "Human rights" were defined as the rights and freedoms recognised in the *ICCPR*, declared by three listed United Nations Declarations — the *Declaration on the Rights of the Child* (1959); the *Declaration on the Rights of Mentally Retarded Persons* (1971); and the *Declaration on the Rights of Disabled Persons* (1975) — or "declared by any relevant international instrument", to leave the way open for an expansion of the Commission's jurisdiction.[7]

Continuing the central role of conciliation established in relation to *RDA* complaint-handling, the Commission was to endeavour to effect a settlement of the matters that gave rise to any complaint against the Commonwealth under this "human rights" jurisdiction. But the next step was different. If a conciliation was not successful, and the Commission considered the act or practice *was* in breach of a human right by reference to the relevant international instruments, the Commission was obliged to report to the Minister (the Attorney-General) "the results of its inquiry and of any endeavours it has made to effect a settlement".[8] On receiving a report, the Minister was then obliged to table it within 15 sitting days.[9] In contrast to racial discrimination complaints, the 1981 Act did not make a breach of human rights unlawful.[10] A complaint stopped at the Human Rights Commission and the report to the Attorney-General that was tabled in Parliament. There was no recourse to the courts.

So, what was the point of this reporting?

Then Attorney-General, Senator the Hon Peter Durack, said that the reports would ensure that governments and parliaments were "aware of situations in which there needs to be a redefinition of the rights of different individuals" and that this would "stimulate them to take appropriate action".[11] Though not enforceable, the reports were therefore seen as performing a broader educative function — changes in attitudes and perhaps law reform — but they were still dependent on a complaint being brought in the first place. In 1986, the Commission was put on a permanent footing and this "human rights" jurisdiction continued under it, under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (*HREOC Act*). It is what we now, after the renaming of the Act as the *Australian Human Rights Commission Act 1986* (Cth) (*AHRCA*), call our "*AHRCA* complaints jurisdiction" and it has been a foundational aspect of our way of working.

With the *HREOC Act*, a further jurisdiction was added, in implementation of the *Discrimination (Employment and Occupation) Convention, 1958* (ILO 111),[12] which was reflected in the name of the new Commission as the Human Rights and Equal Opportunity Commission or "HREOC" as it was familiarly known.[13] The focus was on equal opportunity in employment.

6 Ibid s 3(1) (definition of "act or practice").
7 Ibid (definition of "human rights" and of "declarations"). "International instrument" was defined as including a declaration "made by an international organization": ibid (definition of "international instrument").
8 Ibid ss 9(1)(b), 10(7), 16(2).
9 Ibid s 30.
10 Human Rights Commission, *Annual Report, 1983–84* (Report, 1985) 19.
11 Commonwealth, *Parliamentary Debates*, Senate, 25 September 1979, 939 (Peter Durack, Attorney-General).
12 *Discrimination (Employment and Occupation) Convention, 1958*, ILO No 111 (adopted 25 June 1958, entered into force 15 June 1960).
13 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (*HREOC Act*).

The *HREOC Act* now distinguished between "unlawful discrimination" under the *RDA* and the *Sex Discrimination Act 1984* (Cth) (*SDA*), and "discrimination" *simpliciter* to refer to ILO 111 discrimination. While there was overlap between the concepts,[14] the range of grounds to which ILO 111 discrimination applied was broader than the range of grounds covered by unlawful discrimination, but was limited in its application to "employment or occupation". Unlawful discrimination, under the *RDA* and *SDA*, operated in a wide range of areas of "public life" (for example, in employment, education, accommodation and the provision of goods and services).[15]

To the *RDA* and *SDA* were added the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth), setting the parameters of "unlawful discrimination" in each domain and reflecting commitments under international treaties, bringing into domestic law *some* of the promises in those treaties.

The principal difference between the protections under the Discrimination Acts and the *AHRCA* and ILO 111 complaints jurisdictions is that the former set establishes a cause of action, by making *unlawful* the actions covered by each Act, in consequence of which a complainant may be able to invoke the jurisdiction of the courts. The *AHRCA* and ILO 111 jurisdictions end with a report. But, since 2017, there is no longer even any obligation on the Attorney-General to table them — contrary to the very raison d'être of the reporting limb in its conception.

I asked earlier, what's the point? Whatever it was, was clearly abandoned in 2017.

The overall complaints-handling jurisdiction

The Commission is contacted by, on average, at least in pre-COVID times, 15,000 individuals and businesses a year, seeking information about their rights and obligations. They are assisted or referred, and in some instances proceed as complaints. About 2,000 individuals each year (on pre-COVID numbers) pursue the Commission's formal complaints process — one that is based on alternative dispute resolution. Only a tiny number of those complaints ever end up in court (on average 2–4%); and most participants, both those who complain and those who are complained against, are very satisfied with the professionalism of the process and its outcomes.

These numbers have escalated in recent years. During COVID, the inquiries and complaints essentially doubled and have now settled at a higher base. So, for example, in 2022–23 we received 2,562 complaints, setting the base number around 2,500 complaints. For information, of the complaints received, the clear majority were complaints under the *Disability Discrimination Act* (1,190 or 46%) and of the complaints received under that Act, 50% related to goods and services.

14 Australian Human Rights Commission (AHRC), *Federal Discrimination Law* (AHRC, 2016) 4.

15 The definition of "discrimination" in s 3(1) of the *HREOC Act* (n 13) was expanded by the *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth) to include any distinction, exclusion or preference made on the ground of, principally: age; medical record; criminal record; impairment; marital status; mental, intellectual or psychiatric disability; nationality; physical disability; sexual preference; trade union activity.

If we are looking at administrative mechanisms protecting vulnerable members of the community, the contribution of the Commission is massive over the years since it was established in 1981. For example, if we look at the number of complaints received and conciliated over a period of 20 years, from 2009 to 2018, the numbers represent successful alternative dispute resolution through conciliation for more than 30,000 people and organisations.[16] And these are not *just* numbers: for every matter there is an individual who has taken the initiative, sometimes even the courageous decision, of coming to the Commission.

But it is not enough.

The reporting mechanism for *AHRCA* complaints has essentially become irrelevant to the executive, apart from the ping-pong of paper the complaints process engenders, principally with the Department of Home Affairs.

Institutionally, then, we are like a doughnut — with a hole in the middle.

And legislatively, the framework of protection is deficient, expressed only in the suite of anti-discrimination laws.

The hole in the doughnut

When the government was developing the model for HREOC, it proposed that the functions in relation to the *ICCPR* would now be exercised under an Australian Bill of Rights Act, rather than through the indirect mechanism referable to the international instrument.[17] The Australian Bill of Rights Bill 1985 (Cth) replicated the human rights functions of the Commission since the 1981 Act, but now by reference to the human rights set out in the Australian Bill of Rights Act, through direct and comprehensive domestic implementation.

In his second reading speech, referring to the significance of ratifying the *ICCPR*, the then Attorney-General, the Hon Lionel Bowen MP, said that the Government had "never been satisfied that administrative mechanisms, particularly of the limited kind which eventually emerged under the 1981 Act, were the only means by which Australia could or should carry out such a clear undertaking".[18] Even so, the Bill did not contain justiciable remedies for a breach of a human right.[19] Rather, it was designed to be "an inspirational charter for the Australian

16 Looking at reports from July 1998 to July 2018.

17 A summary of the history of the Australian Bill of Rights Bill 1985 is found in George Williams, "The Federal Parliament and the protection of human rights" (Research Paper No 20, Parliamentary Library, Commonwealth, 11 May 1999) 10–11.

18 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 October 1985, 1706 (Lionel Bowen, Attorney-General).

19 Australian Bill of Rights Bill 1985 (Cth) cl 17(1), providing that nothing in the proposed Act conferred on a person any right of action in respect of the doing of an act that infringed a right or freedom set out in the Bill of Rights.

community":[20] a "positive means of guiding the actions of legislators, administrators and public officials" and "a guide to the courts in determining the common law from time to time".[21]

The 1985 Bill was passed in the House of Representatives, but did not survive the Senate.

But the landscape has shifted across the nation. There is considerable momentum in the direction of stronger human rights protections in Australia in the form of dedicated legislative embodiment in Human Rights Acts in Queensland, Victoria and the Australian Capital Territory. There is considerable agitation and advocacy in other state and territory jurisdictions towards this objective too.

In March, we launched our second position paper in our Free & Equal national conversation, with a model Human Rights Act proposal. Our first paper, released in December 2021, provided a roadmap of reforms across the suite of four discrimination laws.

Our model for a Human Rights Act develops from the existing state and territory models, and complements them in the areas of federal competence and applies to federal public authorities. The human rights instruments in place in Victoria, Queensland and the Australian Capital Territory should not be affected by a federal Human Rights Act. The remaining states and the Northern Territory could be encouraged to adopt a human rights instrument that mirrors the federal one.

Our model also goes much further than the earlier consideration of a Bill of Rights proposal, and is based on:

- a positive duty on public authorities — to act compatibly with human rights and consider human rights when making decisions;
- enhanced parliamentary scrutiny;
- an interpretation clause; and
- remedial pathways.

Why do we need a federal Human Rights Act, and why now?

Two good reasons: (1) the design and interpretation of the *Migration Act* as authorising indefinite administrative detention; and (2) recent royal commissions into government decision-making.

20 Explanatory Memorandum, Australian Bill of Rights Bill 1985 (Cth) 8.
21 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 October 1985, 1706 (Lionel Bowen, Attorney-General).

The design and interpretation of the Migration Act 1958 (Cth)

Laws that enable breaches of international conventions — like the *Migration Act* which authorises indefinite administrative detention, with little constraint — are why we need a federal Human Rights Act.

In *Al-Kateb v Godwin* the legality of administrative detention by the Commonwealth under the provisions of the *Migration Act* was upheld.[22] Since 1992, any non-citizen who is in Australia without a valid visa must be detained according to the *Migration Act*. These people may only be released from closed immigration detention if they are granted a visa, or are removed from Australia.

But through the lens of art 9 of the *ICCPR*, "No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

Al-Kateb does not stack up against art 9.

And it is of ongoing concern, as seen in the complaints under our *AHRCA* jurisdiction. Article 9 has been the subject of a large amount of Commission work, particularly in the context of immigration detention.[23]

In all 19 *AHRCA* reports over the past four years, Reports 129–147, the Department of Home Affairs was the respondent.[24] In none was the respondent interested in conciliation.

Following *Al-Kateb*, a number of amendments were made to the *Migration Act* in an attempt to overcome *some* of its more undesirable consequences — including that the Minister was given the power to place a person into "community detention" as an alternative to closed detention. While such options offered the *potential* for avoiding arbitrariness, the powers relied on the discretion of the Minister and the Minister had no duty to consider exercising them.

22 *Al-Kateb v Godwin* (2004) 219 CLR 562. The decision prompted much discussion about the essential principle that indefinite detention is lawful under Australian law. See, eg, Rainer Thwaites, *The Liberty of Non-Citizens: Indefinite Detention in Commonwealth Countries* (Hart Publishing, 2014), especially chs 3 and 4; Juliet Curtin, " 'Never say never': *Al-Kateb v Godwin*" (2005) 27 *Sydney Law Review* 355; Matthew Zagor, "Uncertainty and exclusion: detention of aliens and the High Court" 34 *Federal Law Review* 127; Joyce Chia, "Back to the *Constitution*: the implications of *Plaintiff S4/2014* for immigration detention" (2015) 38(2) *University of New South Wales Law Journal* 628; Peter Billings, "Whither indefinite immigration detention in Australia? Rethinking legal constraints of the detention of non-citizens" (2015) 38(4) *University of New South Wales Law Journal* 1386; David Burke, "Preventing indefinite detention: applying the principle of legality to the *Migration Act*" (2015) 37 *Sydney Law Review* 159.

23 A recent example is *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, a grouped report involving a number of complainants raising similar issues. Because the complaints pre-dated the 2017 amendments, the Attorney-General was obliged to table the report.

24 "Reports to the Minister under the AHRC Act", *Australian Human Rights Commission* (Web Page) <https://humanrights.gov.au/our-work/legal/projects/human-rights-reports>.

In a continuing series of *AHRCA* reports, the Commission has noted, with increasing urgency, that the approach to mandatory detention in practice, and particularly closed detention, generally examines the problem in the wrong way.

The question appears *not* to be asked whether it is *necessary* for a person to be detained, including whether any risks they may pose to the community can be appropriately mitigated through conditions (like parole). Instead, the approach has been rather to take closed detention as the *default* position for broad categories of people, and to consider whether there are any exceptional circumstances that would justify their release.

To put this into perspective: the average length of detention has continued to increase. The *average* length of detention is now 735 days — but this is not the highest ever recorded. The highest recorded figure was 806 days, recorded on 31 January 2023.[25] The number of people in long-term detention (over two years) comprised 37.1% of the detention population (418 individuals), while 12% of the detention population (135 individuals) had been detained longer than five years.

It is well established that prolonged detention is a risk factor for mental ill-health — the negative impacts of immigration detention on mental health worsen as the length of detention increases.[26] This is of particular concern in the current context, given the consistently high average length of detention in recent years, and the large number of people being held in closed facilities for prolonged periods.

I should note, however, that we have established constructive and regular forms of engagement with the Australian Border Force and with the Department of Home Affairs as part of seeking to address these broader policy issues, within the current policy settings of government. We are still continuing that conversation.

But, when it comes to our function to consider human rights complaints, domestic law and international expectations are at loggerheads.

In 2005, after *Al-Kateb*, the Commonwealth Ombudsman introduced a process of review of people who had been held in immigration detention for two years or longer. This oversight mechanism was aimed at providing better transparency with respect to long-term detainees. What does this mean for people who have been in detention for four times this period — and more?

25 Department of Home Affairs (Cth), *Immigration Detention and Community Statistics Summary: April 2023* (Report, May 2023); AHRC, *The Use of Hotels as Alternative Places of Detention (APODs)* (Report, June 2023) 18, figure 2.

26 See, eg, AHRC, *Inspections of Australia's Immigration Detention Facilities 2019 Report* (Report, December 2020) 134.

The majority judges in *Al-Kateb* acknowledged the consequences of their decision. Justice McHugh considered the result "tragic".[27] Ten years after the decision, Justice Dyson Heydon described his judgment as "what you may call the inhumane approach".[28]

In that case, Justice Kirby was in dissent, with Justice Gummow and then Chief Justice Gleeson.

The principle of legality, which has been championed as the common law's protection of rights and freedoms,[29] did not save Mr Al-Kateb.[30]

The principle of constitutionalism did not constrain the *Migration Act*.[31]

Justice Kirby urged the use of international human rights law as a legitimate and valuable part of the interpretive context. Justice McHugh fervently rejected this approach, notwithstanding the tragedy of the case.

In 2019, in the Mason Conversation of the Gilbert and Tobin Centre of Public Law of the University of New South Wales, now former Justice McHugh said that he would have decided *Al-Kateb* differently if we had had a Human Rights Act.[32]

Until then, the framework of *Al-Kateb* constrains judicial consideration of issues — such as the legitimacy of using "alternative places of detention", or "APODs", the lawfulness of which was upheld by Murphy J in *Azimitabar v Commonwealth of Australia*, but not without observing that the use failed the test of basic humanity.[33]

For this to change, the design of legislation and its interpretation needs to change. With respect to judicial consideration, our model recommends an interpretive clause:

> All primary and subordinate Commonwealth legislation to be interpreted, **so far as is reasonably possible**, in a manner that is consistent with human rights.[34]

Parliament could still reach a conclusion, and express its intention clearly, in legislation that indefinite administrative detention is authorised under the *Migration Act*, but the hurdles for being able to do this, and the constraints around it, would be far stronger. The accountability

27 *Al-Kateb* (n 22) [31].

28 As cited in Burke (n 22) 159. A small compensation perhaps is that, after the case, Mr Al-Kateb was granted a bridging visa and, in late 2007, he was granted leave to remain in Australia indefinitely: Thwaites (n 22) 98.

29 James Spigelman, "The common law Bill of Rights" in *Statutory Interpretation and Human Rights* (McPherson Lecture Series, vol 3, 2008) 9. See also RS French, "The common law and the protection of human rights" (Speech, Anglo Australasian Lawyers Society, Sydney, 4 September 2009) 2.

30 David Burke has argued powerfully that the principle of legality was misapplied by the majority, to the extent that overturning the decision is justified: Burke (n 22).

31 Thwaites (n 22) ch 3.

32 University of New South Wales, "2019 Mason Conversation – Gilbert + Tobin Centre of Public Law" (YouTube, 15 August 2019) <https://www.youtube.com/watch?v=XhAveYy68IM>.

33 [2023] FCA 760 at [5].

34 AHRC, *A Human Rights Act for Australia* (Position Paper, 2022) 251 (emphasis in original). This formulation was developed by the Law Council in its Human Rights Charter policy: see Law Council of Australia, *Federal Human Rights Charter* (Policy Position Paper, November 2020) 3.

in human rights terms would be far higher, and the leverage for people seeking to challenge decisions much more potent.

Royal commissions

Then you add in royal commissions. Our experience with very costly royal commissions[35] — most recently, into the Robodebt scheme, and the abuse experienced by persons with disability and in aged care — has exposed egregious human rights breaches, and shown how our existing systems are not adequate.

Royal Commissioner, the Hon Catherine Holmes AC SC, said in her preface to the Robodebt report, that "whether a public service can be developed with sufficient robustness to ensure that something of the like of the Robodebt scheme could not occur again will depend on the will of the government of the day, because *culture* is set from the top down".[36] The report concluded:

> The Scheme was launched in circumstances where little to no regard was had to the individuals and vulnerable cohorts that it would affect. The ill-effects of the Scheme were varied, extensive, devastating and continuing.[37]

Moreover, the report noted,

> social security recipients include some highly vulnerable groups: people who need access to the system at times of crisis because they are experiencing disadvantage, which might be due to physical or mental ill-health, financial distress, homelessness, family and domestic violence, or other forms of trauma.[38]

Commissioner Holmes also pointed to

> the ineffectiveness of what one might consider institutional checks and balances — the Commonwealth Ombudsman's Office, the Office of Legal Services Coordination, the Office of the Australian Information Commissioner and the Administrative Appeals Tribunal [AAT] — in presenting any hindrance to the scheme's continuance.[39]

Commissioner Holmes found evidence of failures of members of the Australian Public Service (APS) to live up to the values and standards of conduct expected of them by the Australian community, which are expectations set out in the *Public Service Act 1999* (Cth), the *APS Code of Conduct*, the *Public Governance, Performance and Accountability Act 2013* (Cth) and the *Public Interest Disclosure Act 2013* (Cth).[40]

35 It was estimated that the Royal Commission into Aged Care will cost the Australian Government $104 million over four years: Sarah Scopelianos, "The Royal Commission into Aged Care Quality and Safety explained", *ABC News* (online, 11 February 2019) <https://www.abc.net.au/news/2019-02-11/aged-care-royal-commission-explained/10759398>; and the Royal Commission into Violence, Abuse and Neglect and Exploitation of People with Disability will cost $527 million: Rosemary Bolger, " 'It's not flash being disabled': PM launches $527 million disability royal commission", *SBS News* (online, 5 April 2019) <https://www.sbs.com.au/news/article/its-not-flash-being-disabled-pm-launches-527-million-disability-royal-commission/wt11e0a3k>.

36 *Royal Commission into the Robodebt Scheme* (Final Report, 7 July 2023), vol 1, iii (emphasis added).

37 Ibid vol 2, 342.

38 Ibid vol 2, 327.

39 Ibid vol 1, iii.

40 Ibid vol 2, ch 23.

How would a Human Rights Act make a difference?

"Culture" would be anchored in a framework of human rights.

The public service would have a *positive duty* to act compatibly with human rights and consider human rights when making decisions. It would be an application of the Royal Commission's Recommendation 23.2: Obligations of public servants: "The APSC should, as recommended by the Thodey Review, deliver whole-of-service induction on *essential knowledge* required for public servants."[41]

A human rights-based approach would improve trust in government decision-making, due to guaranteed rights protections, and the increased transparency and accountability it would bring. Public trust enhances respect for the law, provides greater legitimacy for authorities and institutions, and deepens social cohesion.[42]

Recommendation 10-1 from the Royal Commission's report highlights the importance of public authorities *designing policies and processes* "with emphasis on the people they are meant to serve".[43] The recommendation states that this should entail, for example, "avoiding language and conduct which reinforces feelings of stigma and shame associated with the receipt of government support when it is needed", and "explaining processes in clear terms and plain language in communication to customers".[44]

With respect to automated decision-making, ensuring human rights are factored into design was an aspect of the work of the Commission in the *Human Rights and Technology* report.[45] Squaring machine learning digital initiatives with the rule of law is clearly necessary — as Terry Carney highlighted in an article in 2018.[46] His AAT findings in particular matters and his evidence were also central to the Royal Commission.

Dealing with human rights breaches after the fact can give rise to vast consequences including unexpected costs from failing to consider human rights early. Robodebt led to a resulting class action, and prompted its own royal commission. Dealing with human rights issues early has obvious economic benefits.[47]

By considering the human rights impacts of a proposed law or policy upfront, there is also a reduced likelihood that decisions will breach human rights and therefore the risk and costs of court action are avoided.

41 Ibid vol 1, xx (emphasis added).
42 "Trust in public institutions: trends and implications for economic security", *United Nations Department of Economic and Social Affair*s (Web Page, July 2021) <https://www.un.org/development/desa/dspd/2021/07/trust-public-institutions/>.
43 *Royal Commission into the Robodebt Scheme* (n 36), Recommendation 10.1.
44 Ibid.
45 AHRC, *Human Rights and Technology* (Final Report, 2021).
46 T Carney, "The new digital future for welfare: debts without legal proofs or moral authority?" (2018) *UNSW Law Journal Forum* 1.
47 Luke Henriques-Gomes, "Robodebt: court approves $1.8bn settlement for victims of government's 'shameful' failure", *The Guardian* (online, 11 June 2021) <https://www.theguardian.com/australia-news/2021/jun/11/robodebt-court-approves-18bn-settlement-for-victims-of-governments-shameful-failure>.

Our model for a Human Rights Act

The Commission's model focuses strongly on the "upstream" arena of decision-making and policy development — the "positive duty" on the executive to act compatibly with human rights and consider human rights when making decisions. Government entities, known as "public authorities", would be bound by this duty and would have to give "proper consideration" to how human rights apply to making decisions and implementing legislation and policy — it is a procedural obligation. The requirement to "act" compatibly with human rights is a substantive obligation on public authorities.

Public authorities would also be required to engage in participation processes where the participation duty is relevant, as part of the "proper consideration" limb.

Compliance with the positive duty would be reviewable by the courts and tribunals.

The positive duty would require decision-makers to consider human rights at an early stage, helping to prevent breaches before they occur.

The integration of human rights considerations into the decision-making processes of public authorities should make public servants more aware of the impacts of their decisions, and therefore help to prevent human rights breaches in decision-making and policy design. However, sometimes better processes and education will not be enough, and breaches of human rights may occur. In those circumstances a federal Human Rights Act (HRA) should provide a complaints pathway, a cause of action and enforceable remedies.

This is a singular point of difference with other models. The Commission's proposed rights are all amenable to enforcement by complaints bodies and courts. Unlawful actions and decisions in relation to all rights in the HRA should give rise to a standalone cause of action. This would provide clarity and consistency and enable the enforcement of rights in accordance with Australia's international obligations.

The Commission proposes implementing an HRA complaint system that mirrors the discrimination law jurisdiction. This would mean that there would be a requirement for complainants to first bring a complaint to the Commission, and if conciliation fails, or is inappropriate, the complaint would be terminated by the Commission and the complainant could then move onto the courts (or tribunals) for adjudication. The same processes that currently exist for unlawful discrimination would apply in the human rights context (including all the termination grounds, and representative complaints processes).

Our existing *AHRCA* jurisdiction would be replaced by this new approach.

However, because human rights claims are different in kind from complaints of unlawful discrimination, the Commission proposes additional termination grounds to apply to human rights complaints. These would enable a claim to be fast-tracked to the court where there is an imminent risk of irreparable harm.

An accessible complaints process would reduce the impact of a federal HRA on the judicial system. Litigation need not be the only port of call for people who wish to make a complaint alleging a breach of human rights. Rather, it is a necessary last resort when other avenues have failed. It provides the leverage — without it, you do not get the accountability you need for improving decision-making. But *litigation is not the point*. It is the positive duty on public authorities to get it right in the first place — by developing policies and framing decisions through the lens of human rights.

How would our proposals relate to existing administrative law mechanisms?

Australia has existing administrative law mechanisms to review the actions and decisions of public authorities. A federal HRA would supplement the existing bases for challenging government decisions.

If human rights (either consideration of, or substantive compliance with) were a *requirement* for a particular administrative decision that is reviewable by the AAT, the AAT will be able to consider human rights independently. The AAT would be able to find that a person's human rights have been affected and take this into account in an administrative decision.

A person who considers that a statutory decision-maker did not give proper consideration to a relevant human right, as required by a federal HRA, could seek judicial review of the decision through the courts. Under existing grounds for review, a person could argue that the decision-maker made a decision that was contrary to law or was an improper exercise of power because of a failure to take into account a relevant consideration. The Commission recommends that principles of administrative law and administrative remedies should apply as usual under the federal HRA.

In addition, existing judicial review pathways and remedies would be preserved through the HRA. That is, the person may also seek ordinary judicial review of a decision of a public authority, either as an alternative or in addition to a direct cause of action under the HRA.

Administrative law should therefore apply as usual in relation to review of decisions affecting human rights.

Conclusion — a call to action

The reality is that our legal framework for protecting human rights in Australia, and for the prevention of discrimination, has changed very little in a generation.

The introduction of a positive duty for some grounds under the *SDA*, but not others, and not for other Discrimination Acts, is a notable exception to this inertia.

Very little of the human rights framework that was introduced as a response to the Brennan national human rights consultation in 2009 has endured.[48]

48 See *Report on the Consultation into Human Rights in Australia* (30 September 2009) (Brennan Report).

And we are left with a *passive system of rights protection* where:

- the protection against discrimination relies on individual complainants bringing actions when they have experienced harm, instead of proactive measures focused on prevention and building a culture of respect;

- the protection against human rights violations by the federal government — through the Commission's human rights jurisdiction — is mostly without consequence;

- there is a lack of transparency about how government addresses known human rights concerns — such as the issues raised by treaty body committees and through individual communication processes;

- there is an absence of benchmarks and targets against which to regularly hold government to account for progress in protecting human rights; and

- there is a serious absence of measures to educate the community about human rights, or to ensure that public servants see the protection of the rights of people in Australia as their core business.

This has to change. There must never be a need for another Robodebt Royal Commission.

Government is here to improve the lives of everyone in Australia. The impact of government decision-making on the wellbeing of the community that they serve should be top of mind, all of the time.

And our conversation about human rights should be a positive, ambitiously focused agenda about what government should be doing to ensure that we all have the opportunity to thrive and develop, free from discrimination and with our full human dignity respected and protected.

Please join us in advocating for a new national human rights framework, and for robust legal protections at the national level.

Tax law, public trust and confidence in the Australian tax system

*David W Marks and Matthew Paterson**

A prolific decision-maker

The Australian Taxation Office (ATO) is one of the most prolific administrative decision-makers in Australia.

Not only is the revenue that it collects the lifeblood of the Australian Government, but its decisions on the manner in which tax laws are administered affect nearly every Australian. Tax is an instrument of policy, not just a means of funding it.[1]

Further, the ATO's systems must have the flexibility to deal with everybody — from the lowest income-earners, who may be socially or economically disadvantaged, to expensively advised, multi-billion-dollar, multinational corporations.

As such, public trust and confidence in the ATO's administration of tax law is a matter of national significance.[2] Inevitably, the ATO's performance and powers are a matter of comment and debate. Everyone has an engagement. Everyone has an interest in knowing they will be treated fairly and predictably.[3]

In this article we address three facets of the administration of tax laws in Australia, each of which poses issues for the public trust and confidence in the Australian tax system. We do not suggest, on the evidence to hand, that administrative systems have broken down. Indeed, it would be difficult to suggest this, given the statistics on one kind of decision-making process, discussed below. And a recent objective measure, of trust, rates the ATO very highly.[4] Rather, we see opportunities for enhancement of existing systems contributing to the integrity of the system.

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1 Tax is most plainly seen as an instrument of policy in schemes such as the Superannuation Guarantee Charge (SGC). Failure to pay minimum super contributions is not an offence. It simply leaves the employer open to tax, tax penalties and interest. The tax and penalties are not deductible for income tax purposes (unlike most employer super contributions, which meet the minimum "requirements" of SGC).

2 As a former Commissioner of Taxation said: "For Australia, the effectiveness and integrity of the ATO provided the country with a comparative advantage in the reliable collection of taxes with which to fund the policies and vision of respective governments; and in terms of helping to build trust and confidence in Australia's democracy." See Michael D'Ascenzo AO, "Modernising the Australian Taxation Office: vision, people, systems and values" (2015) 13(1) *eJournal of Tax Research* 1, 3.

3 Refer to the recently reissued ATO Charter, formerly "Taxpayers' Charter": "Our Charter", *Australian Taxation Office* (Web Page, 26 June 2023) <https://www.ato.gov.au/About-ATO/Commitments-and-reporting/ATO-Charter/Our-Charter/>.

4 A recent measure of public trust in the Commonwealth public sector rated the ATO as the most trusted institution: Department of Prime Minister & Cabinet, *Trust in Australian Public Services: 2022 Annual Report* (Report, 14 November 2022) 6.

First we address issues regarding availability of forward guidance from the ATO in its administration of tax laws. These include:

(a) the private binding ruling (PBR) regime, including current limitations that lead to inflexibility of that regime; and

(b) other pre-emptive engagement with the ATO: although the ATO encourages pre-emptive engagement by taxpayers concerning questions where there is doubt, there is a tension with the ongoing trend of depersonalisation of the ATO's public-facing engagement.

Second, we examine some interesting preliminary results of the analysis by the Inspector-General of Taxation and Taxation Ombudsman (IGTO) of the tax objection process, showing what we characterise as "churning" of income tax decisions within the ATO. This particularly affects objections filed against self-assessed income tax, where the taxpayer is presumably filing on a more conservative basis, and then relies on the objection regime to obtain what the taxpayer regards as the "correct" result, a lower amount of tax or some other more favourable result. This calls for greater examination, to clarify whether the churn is reduced by pre-lodgement engagement.

In this respect, the raw data so far sourced by the IGTO still invites dissection and analysis. It is remarkable that in the three financial years for which data was examined, objections against self-assessments that were allowed in full:

(a) greatly exceeded the number of such objections disallowed; and

(b) in two of the three years exceeded the number of objections allowed in full where the assessment had arisen from ATO compliance activity.

Such results give the outward appearance of possible scope for efficiency gains, current wasted costs both by the regulator and the taxpayer, and delayed resolution. This would be a particular issue if taxpayers had already relied on available mechanisms for forward guidance, and been led through those existing mechanisms to file on a more conservative result, ultimately reversed.

Third, we consider the mechanism and structure for external reviews of ATO objection decisions, which at date of writing remain uncertain. The final shape of the replacement body for the Administrative Appeals Tribunal (AAT) has not been announced. We point to the desirability that any external review body have the expertise and mechanisms to resolve tax disputes quickly and accurately. By far the greater number of tax disputes are filed with the AAT than with the Federal Court of Australia.

We are conscious that tax disputes form a small subset of the overall work of the present AAT. The number of filed disputes each year is relatively small,[5] and the number proceeding

5 Less than 2% of filings: Administrative Appeals Tribunal, *Annual Report 2021–22* (Report, September 2022) 21.

to a contested hearing is much smaller still.[6] Nevertheless, for reasons that we cannot explain, this aspect of the present AAT's work is top of mind. A range of factors and pressures potentially impinge on the effectiveness of a successor body in dealing with tax.

Private binding ruling (PBR) regime

Australia gradually moved to something resembling a "self-assessment" regime, for most classes of taxpayers, formally beginning in the 1986/87 financial year.[7]

We set the scene this way:

(a) Taxpayers are now expected to self-assess in many cases, either in fact or in substance.[8]

(b) There are substantial penalties for incorrectly returning income,[9] which are magnified by Australia's comparatively high income tax rates.[10]

(c) The ATO's sources of information have never been better, given the sweep of domestic and international automated reporting about everything from dividends to luxury car sales.[11]

(d) Where there is a transaction in progress, or a taxpayer desires to return income on a basis provided by the ATO, there is facility for the ATO to provide a PBR.

This PBR facility instituted as self-assessment was broadened in Australia and is meant to support self-assessment.

The law provides a way in which a PBR can be provided to a taxpayer.[12] The law also provides how a taxpayer may object against a PBR,[13] and how someone dissatisfied with an objection decision may then either seek review in the AAT or appeal to the Federal Court of Australia.[14]

6 We do not have disaggregated data, but about 6% of matters are disposed of by a decision other than a consent decision, over all matters filed, according to the Administrative Appeals Tribunal, *Annual Report 2021–22*: ibid 22.

7 The history is recounted in David W Marks, "Proceeding in certainty: tax rulings" (2017) 89 *AIAL Forum* 91, 92–4.

8 Companies truly self-assess. Their returns are deemed to be assessments on lodgement: *Income Tax Assessment Act 1936* (Cth) s 166A. For most individuals, returns are not deemed to have been assessed on lodgement but are accepted with checks that are much short of a full assessing process.

9 *Taxation Administration Act 1953* (Cth) sch 1 ch 4 pt 4-25 div 284 (*TAA*).

10 Comparisons are difficult, but the Organisation for Economic Co-operation and Development (OECD) places Australia in the highest 20% of company tax rates, after adjustments to get at an effective rate: OECD, *Corporate Tax Statistics* (4th ed, 2022) 19, figure 8.

11 For a contemporary assessment of international responses of revenue offices to artificial intelligence (AI) and the volume of data available, see Helena Strauss, Tyson Fawcett and Danie Schutte, "An evaluation of the digital response of tax authorities to optimise tax administration within the digitalised economy" (2020) 18(2) *eJournal of Tax Research* 382.

12 *TAA* (n 9) sch 1 s 359-5(1).

13 Ibid sch 1 s 359-60.

14 Ibid ss 14ZYB and 14ZZ.

Thus far, this sounds like a rational system for a self-assessing taxpayer to gain certainty about how to lodge a return.

In practice, however, it has long been thought that the PBR system does not work well for some more significant cases.[15]

The examples below show the strengths and limitations of the PBR regime, without having to get into some of the technical tax details.

Static versus dynamic

Dynamic

A transaction in progress is unsuited to the current PBR process. This is despite a legislative mechanism allowing an application for a proposed transaction.

Initially, the PBR process allowed for no updating of the arrangement put to the Commissioner for ruling. This has been ameliorated in a small degree. During the ruling process, it is possible for the Commissioner to seek a valuation,[16] seek further information from the applicant or from others,[17] make assumptions,[18] and make a "related ruling" (presumably to deal with a situation where a ruling request dealt with a narrow point, but the ATO feels it would be misleading only to answer that narrow issue).[19]

Further, during the objection process the Commissioner may now consider new information but can essentially restart the ruling process if the Commissioner considers that the additional information is such that the scheme to which the application relates is materially different from the scheme to which the ruling relates.[20]

This effectively means that, on objection, and certainly on review or appeal, no further evidence is allowed.[21] The subject matter of the review or appeal is the objection decision, and the objection decision relates to a ruling on a set of facts put to the Commissioner.[22]

15 David W Marks, "Caught in a bind" (1998) 33(1) *Taxation in Australia* 30.
16 *TAA* (n 9) sch 1 s 359-40.
17 Ibid sch 1 ss 357-105, 357-115, 357-120.
18 Ibid sch 1 s 357-110.
19 Ibid sch 1 s 359-45.
20 Ibid sch 1 s 359-65. The effect is that the objection is taken not to have been made, and the Commissioner must request the applicant to make an application for another private ruling, effectively restarting the process.
21 Indeed, it is doubtful that evidence, as such, is allowed on review or appeal. But see *A Taxpayer v Commissioner of Taxation* (2007) 97 ALD 501, where a mining engineer explained aspects of the fixed scheme.
22 As noted, further information can be submitted on objection, but *TAA* (n 9) sch 1 s 359-65 restricts how far that is permitted. On review or appeal, nothing further is admitted: *Commissioner of Taxation v McMahon* (1997) 79 FCR 127.

How then does one deal with a transaction actually in progress such as the purchase of the Loy Yang Power Station by Horizon Energy Partners in *Bellinz Pty Ltd v Commissioner of Taxation* (*Bellinz*)?[23]

Justice Merkel described some of the procedural aspects as follows:

> [I]n the course of the proceeding the parties resolved certain complaints of the Lessor Partners as to alleged defects in the private ruling. Consequently agreement was reached as to:
>
> - the documents which comprised the factual information given to the Commissioner and upon which he based his ruling; and
>
> - the arrangement on which the ruling was sought.
>
> These matters are of importance. On a review of a private ruling, whether by the Administrative Appeals Tribunal or the court, the reviewing body is to review the opinion of the Commissioner in the ruling as to the way in which the relevant tax law applies to the "agreement" the subject of the ruling. In doing so, the reviewing body is to be limited to the facts identified by the Commissioner as constituting the arrangement and relied upon him by making his decision … Accordingly, it was imperative that the arrangement the subject of the ruling and the facts on which the ruling was based be clearly identified.[24]

So, critically, the process in *Bellinz* had been so compressed that there was (initial) disagreement as to the very facts of the application for ruling.

This truly was a transaction in progress. Justice Merkel went on:

> However, one of the problems which arose was that the Lessor Partners from time to time sought to comply with objections raised by the Commissioner by making amendments, or agreeing to make amendments, to their transaction documents. As a consequence, the documents recording the arrangements did not necessarily accord with the agreed description of the arrangement or the applicant's submissions as to the arrangements. *Whilst I have endeavoured to accommodate the discrepancies, I would point out that the Court is not giving an advisory opinion on the basis of an arrangement that might be made*. … Yet the agreement by the parties as to the arrangement on which the ruling was sought departs from the documentation. For example, the documentation provides that the option to purchase is subject to the Equipment mortgage but the agreement states that the Equipment mortgage either permits or will be amended to permit legal title to be transferred upon the exercise of the option and payment of the limited recourse, rather than the full, loan under the mortgage. *As pointed out above I have endeavoured to accommodate these matters as they do not affect the final outcome but they do emphasise the importance of the Commissioner stating the arrangement on which he has ruled (and any binding ruling, whether private or public) with clarity and precision in the ruling itself.*[25]

So, for an arrangement still under negotiation, the process of application for a private ruling is less than ideal. And by the time you reach the objection, or further stages of a dispute, the arrangement should be firmly fixed. This does not accommodate continued commercial negotiation on material points.

23 The report of the trial decision by Merkel J is telling and is reported in *Bellinz Pty Ltd v Commissioner of Taxation* (1998) 98 ATC 4399 (*Bellinz*). There was an appeal to the Full Court, reported as (1998) 84 FCR 154, but the appeal was dismissed. This article focuses on the difficulties felt at trial, by the trial judge and by the parties.

24 *Bellinz* (n 23) 4405.

25 Ibid 4405–6 (emphasis added).

Static

In contrast, an arrangement which is essentially static, where the facts may be known with some certainty (so far as those facts are relevant to the tax status), may well be suitable for a PBR application. Indeed, a static arrangement may need ongoing certainty, since any error, say in assumed tax treatment, may have devastating results if allowed to persist for some years.

An example of a static arrangement was in *BERT Pty Ltd v Commissioner of Taxation*.[26] The dispute before the AAT related to the Commissioner's ruling about whether a fund, set up to provide security for workers' entitlements (such as redundancy entitlements), fell within a given category of trust under the income tax laws. This turned entirely on the construction of the trust deed, and of related tax provisions. An accurate answer was able to be given by the Tribunal, one that was later approved in unrelated litigation by another fund in the High Court of Australia.[27]

Complex facts

Where the facts are complex — and whether the matter be static or dynamic — the matter may not be suitable for a PBR application.

This is illustrated by *Aurizon Holdings Ltd v Commissioner of Taxation*.[28] The transaction was of economic significance. A state had restructured and privatised components of its railway. In the course of floatation and listing of part of the railway, and the state's sell-down of its interest, the taxpayer company received $4.4 billion from the state, which was called a "receivable".

The state treasurer issued a direction that the consideration provided for transfer of the receivable from the state to the taxpayer was nil, and that the transfer of the receivable was to be designated as a contribution by the state "to be adjusted against the contributed equity" of the taxpayer.

At that point, the contributed equity of the taxpayer comprised 100 fully paid shares held by two ministers of the state, the allotment of which had been recorded in the taxpayer's authorised capital account.

The directors of the taxpayer then minuted that they recognised the transfer of the receivable from the state as a contribution of equity in accordance with an Australian accounting standard interpretation that they nominated. They directed that the transfer of the receivable be reflected in the company's accounting records.

The taxpayer gave effect to that resolution by creating a "Capital Distribution" account in the amount of $4.4 billion, to reflect the state contribution.

26 (2013) 95 ATR 457.
27 *ElecNet (Aust) Pty Ltd v Commissioner of Taxation* (2016) 259 CLR 73, 79 [12] n 8.
28 (2022) 114 ATR 754 (*Aurizon*).

Shortly after, the offer to the public of shares in the taxpayer was completed, and the taxpayer's shares were listed on the stock exchange.

It should be apparent that the stakes here were very large indeed, no matter what the technical tax question might then be. And the transactions, the directors' minutes, the accounting records and accounting standards would all need to be characterised.

Instead of pursuing an application for PBR, the taxpayer sought a declaration from the Federal Court of Australia in accordance with s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) and s 21 of the *Federal Court of Australia Act 1976* (Cth).

The Commissioner resisted the application, including raising discretionary considerations. It is worthwhile paraphrasing Thawley J's summary[29] of the Commissioner's submissions on this account:

(a) There was an alternative and more appropriate remedy that was available to the taxpayer, an application for a PBR.

(b) In the event that the taxpayer did not agree with the PBR issued by the Commissioner, it had a right to bring proceedings for review or appeal from the PBR (noting of course for completeness that an objection would need to be decided first).

(c) An analogy was drawn with the discretionary limits on challenging an assessment. Specifically, the legislature had enacted a regime allowing challenges to an assessment, and the High Court of Australia had previously said that that legislated regime was the way in which an assessment should be challenged in future, absent good reason.[30] The analogy was thus drawn with the presence of a statutory regime allowing challenge to a PBR.

Justice Thawley said:

> The object of the statutory regime for private binding rulings is to provide a way for taxpayers to find out the Commissioner's view about how certain laws administered by the Commissioner apply to the taxpayer so that the risks to the taxpayer of uncertainty when self-assessing or working out tax obligations or entitlements are reduced … The resulting ruling might be binding on the Commissioner in relation to the particular taxpayer (here, Aurizon), but not others (for example, Aurizon's shareholders) … *The private ruling regime is a useful regime. It is not a regime which is particularly well suited to dealing efficiently with the present case. For one thing, it would have been, to say the least, difficult to identify with any certainty the relevant facts upon which the ruling would be made. As the course of these proceedings has shown, it was only shortly before the hearing that the parties were able to agree a number of relevant facts. Certain facts were only perceived to be relevant, and made the subject of evidence, during the course of the hearing*. Secondly, any appeal would have been confined to the facts as put in the ruling application. If there had been a Part IVC appeal from a ruling, it is likely that the facts in the private binding ruling application would have been shown to be wrong in some respect with the result that the whole process would likely miscarry and need to start again. Thirdly, third parties (Aurizon's shareholders) have an interest in the issue being resolved in a way which binds the Commissioner and this is not achieved through a private binding ruling.[31]

29 Ibid [104]ff.
30 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146.
31 *Aurizon* (n 28) [108] (emphasis added), referring to an appeal under *TAA* (n 9) pt IVC.

It should be noted that the Commissioner disagrees with Thawley J in this respect, relevant to the issues discussed here:

> The Commissioner acknowledges that this was an unusual case. Nevertheless, the Commissioner considers that the private binding ruling process is capable of dealing with complicated factual circumstances.[32]

"Churning" of decision-making objections

The IGTO has published her interim report on *The Australian Taxation Office's Administration and Management of Objections* (*Interim Report*).[33] This was Phase 1 of her investigation. At present, she has before her submissions on Phase 2 of this investigation, but no results have been published yet.

There is much to like about an investigation of this kind.

(a) The investigation in its first phase was data-heavy.

(b) This drew out the fact that some data simply are not available. Other data are, in the ATO's own assessment, not well-maintained at present (due to manual systems). Even these findings are something on which ATO and the IGTO can reflect.

(c) As the first phase was restricted to data for three years, in fairness it may be that none of the figures leads to any statistically robust result. And we are seeing figures affected by the pandemic. Nevertheless, where an effect is strong enough, such as the "churning" effect mentioned below, it remains worthy of further consideration.

(d) The IGTO was not in a position to draw strong conclusions at the end of the first phase.

For Phase 2 of the IGTO's investigation, there are five terms of reference. These focus on the actual objection process, but one feature highlighted in Phase 1 was that "more than 50% of objections received by the ATO in FY19–FY21 (excluding Covid-19 objections) are self-initiated", being "taxpayers objecting against their own self-assessment".[34]

Before we deal with those observations by the IGTO, it is necessary to speak about the data. The IGTO's *Interim Report* details the systems used within the ATO to capture data about objections. The ATO's enterprise case management system does contain a template for an officer to record some matters, but "the ATO has advised the IGTO that these fields are not used for reporting as they are manually entered by officers and the ATO has low confidence in the integrity of the data and its reliability".[35] Thus, the ATO "cautioned against the use of

32 Decision impact statement on *Aurizon Holdings Limited v Commissioner of Taxation* (25 August 2022) <https://www.ato.gov.au/law/view/document?docid=LIT/ICD/NSD1278of2020/00001>.

33 Inspector-General of Taxation, *The Australian Taxation Office's Administration and Management of Objections* (Interim Report, October 2022) (IGTO, *Interim Report*).

34 Inspector-General of Taxation and Taxation Ombudsman, "Your taxpayer right to object — the ATO's administration and management of objections" (Summary Slide Deck accompanying the *Interim Report*, 10 October 2022) 8 (IGTO, Summary Slides).

35 IGTO, *Interim Report* (n 33) 28 [2.25].

this data to draw conclusions", leading the IGTO to treat the data in a way that "minimises the risk of errors and outliers".[36]

Turning then to an aspect of the data that is noteworthy, the IGTO found:

(a) More than 50% of objections are allowed in full (where they are valid objections).[37]

(b) Well over 50% of valid, self-initiated objections — objections coming out of a taxpayer's own self-assessed return — were allowed in full in the three financial years investigated.

(c) In fact, of the three years in question, 60% was the lowest percentage allowed in full, of self-initiated assessments (being for the financial year ended 2021). There was also a small number of objections in each year allowed in part.[38]

(d) More than half of the objections received by ATO in the three financial years were in the self-initiated class.[39]

Particular groups affected by the prevalence of objections to self-initiated assessments were:

(a) individuals;

(b) small businesses;

(c) privately owned and wealthy groups; and

(d) public and multinational businesses.[40]

There were two groups where the trend was the opposite, being for super funds and not-for-profits. There, objections against assessments (or decisions) arising from ATO compliance action predominated.[41]

Possible reasons

Amendment of a return — lack of formal mechanism

There is no formal mechanism for the amendment of a return that has been filed, and the informal mechanisms for amendment of such returns apparently time out.[42] Informal information provided by people who have worked with tax agents indicates that the ATO

36 Ibid 29 [2.26].
37 IGTO, Summary Slides (n 34) 17.
38 Ibid 17.
39 Ibid 19.
40 IGTO, *Interim Report* (n 33) 23 [2.18].
41 Ibid.
42 A taxpayer seeks an amended assessment, say under s 170 of the *Income Tax Assessment Act 1936* (Cth), but faces limitations because of its time limits.

then directs the taxpayer's representative to the objection route, which is a formal, statutory mechanism for seeking a change to a tax assessment.

Since none of the data thus far gathered by the IGTO directly addresses the reasons for that, let alone how prevalent that is, we are left to speculate.

However, it does indicate that one channel, which ought to be used for real disputes, may be utilised as of necessity for matters which are less controversial. The large number of objections being allowed against self-assessments indicates this is possibly occurring.

One feature of the Australian income tax system which can drive this is laws requiring a taxpayer to reconsider a past year's assessment, in light of facts occurring in the present year. Simple examples are:

(a) The timing rule for a contract of sale of property, for capital gains tax (CGT) purposes, deems this CGT event to occur at the time of contract, but there is no CGT event until settlement. In other words, there is an artificial construct about time, but not about the actual occurrence of the CGT event. A contract entered into in May 2024, which is only due to settle in late December 2024 would lead an ordinary individual taxpayer who has not applied for a lodgement extension to file a return as if the CGT event had not occurred, by the gazetted time for lodgement, which is usually October 2024. That individual would then amend the 2023/24 financial year assessment, after settlement.[43]

(b) Where there is loss carry back, or sale of an asset on the basis of some form of profit-sharing with the vendor, similar results can occur.

At one level, if the ATO is simply directing tax agents to the objection process because of the absence of a better way of processing largely uncontroversial amendments to assessments, there is perhaps little harm. The ATO as an institution no doubt can and has adapted to that kind of workflow, if it be true.

But if that workflow is significant, but unquantified, then the present absence of data reflecting that aspect of the workflow disguises other aspects of the noteworthy statistics about objections to self-initiated assessments.

For example, we do not know to what extent an objection has been filed against a self-assessment in circumstances where the taxpayer has already availed themselves of more substantive engagement procedures facilitated by the ATO.[44]

Means of engagement pre-lodgement

A taxpayer may seek to obtain more certainty about how the taxpayer should lodge by seeking a PBR, as discussed above. This is a statutory process.

43 Timing rule on CGT Event A1 is in s 104-10 of the *Income Tax Assessment Act 1997* (Cth).

44 Here, we put to one side a simple engagement about a necessary and uncontroversial amendment to an assessment of the kind discussed above, such as due to the CGT timing rule for sale contracts.

But the majority of engagements between the ATO, on the one hand, and taxpayers and their representatives, on the other hand, is informal. It is done through exercise of the Commissioner's general powers of administration.[45]

Sometimes the ATO engages proactively. An overseas example of such engagement by a revenue authority involved officers of a foreign revenue authority simply turning up at a client's new office in the foreign country. The officers were invited in for tea, and the taxpayer and the officers discussed how the taxpayer was expected to comply with the local tax law. Properly done, this is commendable and usually welcomed by business.

In terms of the taxpayer initiating contact, the ATO has the usual obvious channels:

(a) telephone;

(b) internet — website and portals;

(c) facsimile and mail, which unfortunately persist out of necessity in relation to some forms of contact.

But there are other forms of contact which actually are given labels and have known functions within the bureaucracy:

(a) Sectoral programs such as the "Top 500" and "Next 5000" programs, aimed at wealthy private groups. Here the ATO actively seeks engagement, looking for details so that the ATO understands the group, and attempts to establish a relationship so that there might be "justified trust". A similar program operates for the large business and international sector.[46]

(b) Early engagement for advice. This is open to various taxpayer segments and is intended to assist with complex transactions that a person is considering or has implemented.

(c) The public ruling program and related documents such as practical compliance guidelines. These are available at the ATO website but deserve special mention since some of these forms of "products" can actually operate as binding advice by the ATO.

The "early engagement" process may actually direct the taxpayer or its representative toward another channel, such as an application for a PBR, or to less formal advice which may not have binding effect but nevertheless is regarded as "administratively binding".

45 Separately, the IGTO has initiated an investigation of the exercise of the Commissioner's general powers of administration, which remains underway. This investigation was opened on 9 December 2021. See IGTO, "The exercise of the Commissioner's remedial power" (Web Page) <https://www.igt.gov.au/current-investigation-reports/commissioners-remedial-power/>.

46 See "Findings report Top 500 tax performance program — June 2023" (Web Page, 3 November 2023).

Churn

It is apparent, even from the ATO website, that the ATO makes a very substantial effort to provide a measure of certainty to taxpayers. It remains remarkable that so many self-initiated objections — that is, against assessments which were not the result of audit activity by the ATO — are filed by the very taxpayer who signed the return as correct.

There is as yet an untold story here. Perhaps the data do not exist, and we will never know for sure.

But one thing does come out of the figures: churn.

Given the amount of effort that the ATO is putting into taxpayers attempting to get their returns correct, for the ATO to then have to consider objections filed by taxpayers in circumstances where the taxpayer probably knows that the return self-assesses excessively, is redolent of wasted effort.

The solution, if any, is difficult to see in the absence of hard data. The hard data is apparently not available. This is worth revisiting so that hard data can be produced, the causes of this "churn" further investigated, and some remedy applied to the most significant drivers.

Comparators

The IGTO's *Interim Report* gives raw figures for the flow of objections, reproduced in table 1. These data might be compared to those from over 40 years ago, which were included in the 1983 report of the Administrative Review Council (ARC), *Review of Taxation Decisions by Boards of Review* reproduced in table 2.[47] The ARC further observed: "Statistics on numbers of objections allowed or disallowed are not kept, but the ATO estimates that approximately 75% are either wholly allowed or allowed in part."[48]

The only thing that can explain the fact that, with a smaller taxpayer population in 1981, there were about three times as many objections being filed, is history. This was a different era, when tax schemes were rife, the Commissioner had less access to data, and the ATO had not yet managed to reset community expectations about acceptable fiscal behaviour.

The Hon John Howard, as Treasurer, introduced a new and more effective anti-avoidance provision in 1981.[49] This in itself indicates that the times were very different, requiring an intervention.

47 Administrative Review Council, *Review of Taxation Decisions by Boards of Review* (Report No 17, 1983).
48 Ibid [115].
49 Part IVA of the *Income Tax Assessment Act 1936* (Cth) introduced by Act No 110 of 1981.

Table 1. Objection data and key ratios (overall)

Objection data		**FY19**	**FY20**	**FY21**
Stock on hand (as advised by ATO) – 1 July	A	4,681	6,174	6,422
Objections received	B	27,016	21,892	27,780
Total Objections (A+B)	**C**	**31,697**	**28,066**	**34,202**
Outcomes				
Decisions issued	D	15,088	15,269	22,284
Withdrawn	E	4,538	4,060	3,969
Invalid / other	F	6,650	2,961	3,624
Subtotal – finalised objections (D+E+F)	**G**	**26,276**	**22,290**	**29,877**
Closing balance (calculated by IGTO) (C–G)	H	5,421	5,776	4,325
Stock on hand (as advised by ATO) – 30 June	H1	6,174	6,422	4,658
Key ratios				
Decisions issued as % of Total Objections	D/C	47.60%	54.40%	65.15%
Withdrawn / invalid as % of Total Objections	(E+F)/C	35.30%	25.02%	22.20%
Closing balance as % of Total Objections	H/C	17.10%	20.58%	12.65%
Decisions issued as % of Total Objections excluding invalid and withdrawn objections	D/(C–E–F)	73.57%	72.55%	83.75%
Closing balance as % of Total Objections excluding invalid and withdrawn objections	H/(C–E–F)	26.43%	27.45%	16.25%

ATO: Australian Taxation Office; IGTO: Inspector-General of Taxation.

Source: Inspector-General of Taxation (IGTO), *The Australian Taxation Office's Administration and Management of Objections* (Interim Report, October 2022) 15, table 2.3. Reproduced from the IGTO under a Creative Commons Attribution 3.0 Australia Licence.

Table 2. Income tax objections and appeals for financial year 1981–82

Assessments and objections	
Returns lodged in respect of all years, taxable and non-taxable	8 602 000
Current assessments issued, taxable	6 048 449
Previous year's assessments issued, taxable	311 000
Total assessments issued	6 359 449
Objections on hand at 1 July 1981	73 627
Objections received during year	189 311
	262 938
Objections decided during year	182 284
Objections on hand at 30 June 1982	80 654
Requests for references and appeals	
Requests for reference to Boards of Review	16 214
Requests for objection to be treated as appeal to Supreme Court	478
Total requests for references and appeals	16 692
Cases for reference to Boards (all taxes):	
– allowed by Commissioner	4 149
– settled	6 695
– withdrawn by taxpayer	4 473
	15 317
– transmitted to Boards during year	543
– cases awaiting transmission at 30 June 1982	25 569
Cases for appeal to courts:	
– awaiting transmission at 30 June 1983	1 506
Action taken by Boards of Review (all taxes)	
References outstanding at 1 July 1981	788
References transmitted during year	543
Total references	1 331
Manner in which dealt with:	
– allowed	20
– partly allowed	76
– disallowed	305
– withdrawn, allowed or settled prior to listing	107
– awaiting decision or part-heard	55
– awaiting hearing at 30 June 1982	768

Source: Australian Taxation Office © Commonwealth of Australia 2023, reproduced in Administrative Review Council, *Review of Taxation Decisions by Boards of Review* (Report No 17, 1983), table 1.

Ensuring appropriate external review

Background to the current system of review

While the "churning" of income tax assessments on the one hand highlights inefficiencies in the current system of self-assessment, on the other hand it demonstrates that the ATO earnestly and seriously considers taxpayers' objections. This is a good thing. As frustrating as the system of self-assessment and objection can be, taxpayers can at least be confident that their concerns will be seriously listened to on an internal review.

Upon receiving their objection decision, if a taxpayer remains dissatisfied they may seek review in either the AAT or in the Federal Court.[50] Where they seek review in the AAT, they may then seek review of those decisions by the Federal Court on questions of law.[51] Taxpayers therefore have, effectively, up to three levels of review of their initial assessments (plus appeals to the Full Court, and to the High Court by special leave).

At trial, the taxpayer bears the onus of proving the assessment is excessive or otherwise incorrect.[52] This "purposely negates any possible suggestion that, by the making of an assessment, the Commissioner of Taxation … assumes an onus of proving that the recipient of that assessment is indebted to the Commonwealth in the amount of the liability thereby created".[53] The policy reasons underlying the imposition of the onus on the taxpayer are grounded in the asymmetry in the information available to the taxpayer on the one hand and the Commissioner on the other.[54]

Judicial vs merits review

Taxation law is notable in providing taxpayers with a preliminary level of merits review (the objection decision process), and with the subsequent option of seeking *either* judicial or tribunal merits review of those decisions. In circumstances where the AAT is now being abolished, before considering design features of any successor tribunal in the tax space, one must consider the anterior question of whether this regime of tiers of review should be maintained.

The availability of *judicial* review of taxation decisions is a constitutional prerequisite for the validity of a law imposing a tax.[55] In *Deputy Commissioner of Taxation (NSW) v Brown*, Dixon CJ observed:

> Although there is no judicial decision to that effect, it has, I think, been generally assumed that under the *Constitution* liability for tax cannot be imposed upon the subject without leaving open to him some judicial process by which he may show that in truth he was not taxable or not taxable in the sum assessed, *that is to say that an administrative assessment could not be made absolutely conclusive upon him if no recourse to the judicial power were allowed*.[56]

50 *TAA* (n 9) s 14ZZ(1).
51 *Administrative Appeals Tribunal Act 1975* (Cth) s 44.
52 *TAA* (n 9) ss 14ZZK, 14ZZO.
53 *Le v Commissioner of Taxation* (2021) 390 ALR 132, 134 [4] (Logan J).
54 Ibid [4].
55 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 153 [9] (Gummow, Hayne, Heydon and Crennan JJ) (*Futuris*); *Ierna Beneficiary Pty Ltd v Commissioner of Taxation* [2023] FCA 725.
56 *Deputy Commissioner of Taxation (NSW) v Brown* (1958) 100 CLR 32, 40 (emphasis added).

This position was reaffirmed by the High Court in *Commissioner of Taxation v Futuris Corp Ltd*.[57] There can thus be little doubt that the federal judiciary both can and should continue to play an important role in the review of taxation decisions.

But what, then, of merits review? To begin, it is necessary to understand the nature of an "appeal" to the Federal Court of Australia, directly from an objection decision.

The so-called appeal is a proceeding in original jurisdiction. The court proceeds by way of rehearing, and it has also been referred to as a "proceeding de novo".[58]

The main drawback in such an appeal is that the court does not review, on the merits, certain states of mind that the Commissioner may form in the course of administration. Rather, review of such formation of a state of mind is limited to traditional administrative law grounds.

Thus, it seems all questions of individual *residency* in Australia must be more usefully commenced in a tribunal affording merits review of such states of mind. For example, one limb of that statutory concept calls upon the Commissioner to consider whether he is satisfied that a person has a usual place of abode outside Australia.[59]

In any case, there has long been a perceived need for a means for taxpayers to seek review of tax assessments without resort to the courts. As early as 1921, the Royal Commissioners on Taxation referred to a "unanimity of opinion" regarding the need for "the appointment of a tribunal, other than a Court, to deal with the numerous cases under the Income Tax Act in which taxpayers dissent from the decisions of the Commissioner, but for various reasons are unable or unwilling to assert what they believe to be their rights, in a superior Court".[60] Accordingly, they recommended "the introduction of 'an independent tribunal (with a simple and inexpensive procedure)' which would be 'more speedy in its methods' than the Courts".[61]

There was a false start. An early iteration of the administrative review of taxation decisions was struck down on the grounds that it vested the judicial power of the Commonwealth in an executive agency.[62] Parliament learned its lessons from this, and the Taxation Board of Review, which it subsequently implemented, successfully withstood a constitutional challenge in the Privy Council in *Shell Company of Australia Ltd v Federal Commissioner of Taxation* (*Shell*).[63] In its reasons, the Privy Council emphasised the administrative nature of the Board of Review:

> The Board of Review appears to be in the nature of administrative machinery to which the taxpayer can resort at his option in order to have his contentions reconsidered. An administrative tribunal may act judicially,

57 *Futuris* (n 55).
58 *Insomnia (No 2) Pty Ltd v Commissioner of Taxation (Cth)* (1986) 84 FLR 278, 287. This was a decision of a State Supreme Court, exercising a jurisdiction later conferred on the Federal Court.
59 *Commissioner of Taxation v Addy* (2020) 280 FCR 46; revd on other grounds: *Addy v Commissioner of Taxation* (2021) 273 CLR 613.
60 *Royal Commission on Taxation* (First Report, 1921) [141].
61 SM Chapple, "Have the Administrative Appeals Tribunal and associated changes improved the resolution of taxation disputes?" (1991) 20 *Australian Tax Review* 245, 246, quoting Roach, "The Good, the Bad and the Ugly" (June 1989) *Australian Accountant*.
62 *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422.
63 (1930) 44 CLR 530 (*Shell*).

> but still remain an administrative tribunal as distinguished from a Court, strictly so-called. … [T]he Board of Review is not exercising judicial powers, but is merely in the same position as the Commissioner himself; namely, it is another administrative tribunal which is reviewing the determination of the Commissioner, who admittedly is not judicial, but executive.[64]

As to the role of the Board of Review (and now the AAT), Kitto J stated that the Board's "function is merely to do over again (within the limits of the taxpayer's objection) what the Commissioner did in making the assessment — not to give a decision affecting the taxpayer's legal situation, but to work out, as a step in administration, what it considers that situation to be".[65] These conclusions have been subsequently applied to the AAT,[66] which replaced the Board of Review following a report by the ARC in 1983.[67]

There are sound reasons for Parliament to maintain a system of merits review of taxation decisions.

First, as observed by the Royal Commissioners on Taxation, the "expense, delay and risk of proceedings in the superior Courts" may deter taxpayers from commencing judicial proceedings to vindicate their rights.[68] Nearly a century later, an academic study found that litigation costs had a significant chilling effect on the number of tax dispute cases brought.[69] Similarly, the Federal Court's 2021/22 annual report disclosed that more than one third of its taxation cases were more than 24 months old.[70]

Conversely, the AAT finalised 82% of all Small Business Taxation division matters, and 59% of all Taxation and Commercial division matters, within 12 months of filing in 2021/22.[71] It also had median times to finalise of 29 weeks and 39 weeks, respectively, for the two divisions.[72] The AAT's costs of litigation are also markedly lower, albeit not insignificant,[73] and may still "put external review out of the reach of most taxpayers and make it uneconomic and impractical for most cases".[74]

It follows that a merits review system in a tribunal will tend to be more accessible than litigation in the courts. This is borne out by the active case figures for 2021/22: in the Federal Court's original jurisdiction 174 tax cases were on foot at the end of the financial year, against 1,784 in the AAT's Small Business Taxation and Taxation and Commercial divisions.[75]

64 Ibid 544–5.
65 *Mobil Oil Australia Pty Ltd v Commissioner of Taxation (Cth)* (1963) 113 CLR 475, 502 (*Mobil Oil*), quoted in *Saunders v Federal Commissioner of Taxation (Cth)* (1988) 15 ALD 353, 358; *Australian Institute of Professional Education Pty Ltd v Australian Skills Quality Authority* (2016) 156 ALD 224, 236 [32] (*AIPE v ASQA*).
66 *Commissioner of Taxation v Apted* (2021) 284 FCR 93, 96–7 [13]–[16] (Logan J).
67 Administrative Review Council (n 47), given effect in 1986 in the *Boards of Review (Transfer of Jurisdiction) Act 1986* (Cth).
68 *Royal Commission on Taxation* (n 60) [143].
69 Binh Tram-Nam and Michael Walpole, "Effective access to independent tax dispute resolution in Australia: the tax lawyers' perspective" (2018) 47 *Australian Tax Review* 5, 12.
70 Federal Court of Australia, *Annual Report 2021–2022* (Report, 2022) table 3.1.
71 Administrative Appeals Tribunal (n 5) 28.
72 Ibid 66.
73 Tran-Nam and Walpole (n 69) 15.
74 Suzette Chapple, "Income tax dispute resolution: can we learn from other jurisdictions?" (1999) 2(5) *Journal of Australian Taxation* 312, 3.7.1.
75 Federal Court of Australia (n 70) table 3.1; Administrative Appeals Tribunal (n 5) 28.

Second, and relatedly, the volume of decisions the federal judiciary would otherwise face would far exceed its capacity to deal with them. In a 1993 paper, the then-President of the AAT, O'Connor J, stated:

> The twin objectives of a system of external review of administrative decisions are accessible, speedy, economical and informal review and an adequate standard of justice in all cases. In high volume jurisdictions … a review system with complementary tiers has been regarded as the way to fulfil these objectives. The first tier operates as a filter, shielding the second tier from significant numbers of disputes, often involving the same basic issue requiring only the application of settled law to individual facts. The second tier formulates and develops principles to guide primary decision-makers and first-tier tribunals.[76]

Although her Honour was writing in the context of two tiers of external merits review (such as is currently in place in social security cases in the AAT), the principle of a primary tier of decision-making acting as a filter for subsequent tiers remains sound. In 2021/22, the AAT had fully ten times the number of active cases as the Federal Court.[77] Even assuming only a percentage of these were to be transferred to the Federal Court, there would still be a drastic increase in the Federal Court's workload. Such an increase would expose a higher proportion of taxpayers to increased delays and costs associated with judicial proceedings.

Third, there may be an intangible, methodological, benefit in allowing for a merits review in a tribunal, rather than review in a court. This sentiment was pithily expressed by the Privy Council in *Shell*:

> Their Lordships are of opinion that it is not impossible under the *Australian Constitution* for Parliament to provide that the fixing of assessments shall rest with an administrative officer, subject to review, if the taxpayer prefers, either by another administrative body, or by a Court strictly so called, or, to put it more briefly, to say to the taxpayer "If you want to have the assessment reviewed judicially, go to the Court; if you want to have it reviewed by business men, go to the Board of Review."[78]

By referring to having a decision "reviewed by business men", the Privy Council recognised that, for many taxation cases, a pragmatic, commonsense approach will deliver a more appropriate outcome for a taxpayer than resort to judicial proceedings will. Put another way, the practical life experience of an administrative decision-maker may result in them being better-placed to understand the rationale and design of business arrangements of everyday taxpayers, though the observation may also reflect the composition of panels of the tribunal at the time.

Fourth, the role of a merits review tribunal is "to do over again (within the limits of the taxpayer's objection) what the Commissioner did in making the assessment".[79] Accordingly, it is not uncommon for taxpayers to commence proceedings in the AAT where a review on the merits of a decision (rather than its legality) is considered desirable. Justice Logan addressed a classic example of a situation where this would be beneficial to a taxpayer in *King v Commissioner of Taxation*, where his Honour observed that "unlike the Court, the Tribunal can decide on the merits and in place of the Commissioner whether or not

76 Deirdre F O'Connor, "Effective administrative review: an analysis of two-tier review" (1993) 1 *Australian Journal of Administrative Law* 4, 7.
77 Federal Court of Australia (n 70) table 3.1; Administrative Appeals Tribunal (n 5) 28.
78 *Shell* (n 63) 544.
79 *Mobil Oil* (n 65) 502, quoted in *Saunders* (n 65) 358; *AIPE v ASQA* (n 65) [32].

remission of penalty is warranted".[80] The ability to re-make such discretionary decisions is a strong reason favouring the retention of an administrative merits review body for taxation decisions — the absence of such a merits review option would leave a significant gap in taxpayers' abilities to have a tax dispute fully heard and determined on an external review.

Key design features

If external merits review by a body other than a court is to be retained, the next question is: how should that body be designed?

Although much ink has been spilled over the decades on the design of external merits review generally, the taxation system has some unique features which warrant consideration. In its 1983 report, the ARC discussed the need to balance the Australian public's interest in ensuring the flow of public revenue with "a community interest in the fair and proper administration of taxation law".[81] Further:

> It is Council's view that the balance of interests achieved in the policies of taxation legislation must be kept in mind when reforms are being considered. So as not to give undue weight to one or other interest, it is necessary to keep distinct the separate strands of policy reflecting the various interests and to ask, in respect of a particular component of the taxation system, what interest it is intended to serve or promote. It is important that the community interest in the performance of the individual's social obligations is not seen as overshadowing the community interest which is reflected in the individual's right to review, or as impliedly cutting down its operation. Equally, it is important that that right of review not be so enlarged as to undermine the social function of taxation.[82]

Despite this policy tension, the ARC report further distilled the basic elements of external merits review almost without reference to the taxation law. It listed them as including:[83]

- "enhancement of administrative efficiency";
- "justice to the individual citizen seeking review";
- "minimisation of the burden upon taxpayers";
- "independence of the tribunal from the decision maker whose decision is being reviewed";
- the distinctive function of the tribunal as engaging in administrative merits review;
- fairness to the individual seeking review;
- ensuring equitable access to administrative review, both in terms of the decisions which may be reviewed, and the individuals who may seek review; and
- ensuring the tribunal's review is informed of the relevant facts and laws.

80 *King v Commissioner of Taxation* (2022) 177 ALD 275, 276 [4].
81 Administrative Review Council (n 47) [14]–[15].
82 Ibid [17].
83 Ibid [63]–[70].

These principles were pithily stated by then-AAT President, O'Connor J, who described the "twin objectives of a system of external review of administrative decisions" as being "accessible, speedy, economical and informal review and an adequate standard of justice in all cases".[84]

More recently, Professor Creyke identified five essential elements of merits review tribunals:[85]

(a) the ability to reach the correct or preferable decision in all the circumstances;

(b) the availability of specialised members and a diverse membership;

(c) flexibility of process;

(d) accessibility; and

(e) cost effectiveness.

Against these generalised principles, one must also remember the technical and occasionally arcane nature of most tax laws — it is, after all, "one of the most complex and voluminous statutory schemes in Australian law".[86] Such complexity must be borne in mind in the design of any merits review tribunal which engages in tax law. For example, while the Queensland Civil and Administrative Tribunal (QCAT) requires that parties not be represented by lawyers except in special circumstances,[87] it has been observed that

> [w]hile self-representation is an important right, tax law is extremely complex so that it is very difficult for self-represented taxpayers to present their facts and evidence, let alone legal arguments, to members of the tribunal/court in a coherent and sensible fashion.[88]

It is notable that lawyers may represent parties in state tax disputes in the QCAT.[89]

It follows that, at least in respect of taxation law, it is important to ensure that legal or other representation is available to taxpayers as they traverse any merits review system.

Similarly, though, this emphasises the importance of adequate experience in taxation law on the part of decision-makers. Just as self-represented taxpayers may struggle to consider and make submissions appropriately, so too may underqualified tribunal members struggle to consider properly and apply some of the more arcane tax laws.

84 O'Connor (n 76) 7.
85 Robin Creyke, "Tribunals — 'carving out the philosophy of their existence': the challenge for the 21st century" (2012) 71 *AIAL Forum* 19. This framework was picked up in Attorney-General's Department (Cth), *Administrative Review Reform: Issues Paper* (April 2023) 18.
86 Wayne Gumley, "The taxation appeals system: an administrative law perspective" (Conference Paper, International ATAX Tax Administration Conference, 1998).
87 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43.
88 Tram-Nam and Walpole (n 69), 13.
89 *Taxation Administration Act 2001* (Qld) s 72.

Accordingly, any assessment of the efficiency of a merits review process for taxation matters must be coloured by an appreciation for the complexity of these matters. It may be that, rather than more streamlined processes, efficiency in taxation matters could be boosted by more robust intervention and decision-making. If the taxpayer is not in a position to guide the process, the decision-maker may have to do so.

Constitution of membership

Perhaps the most important impact on the decision-making of a merits review body is its membership. Although at first this appears to be an almost prosaic observation, the emphasis placed by recent reviews of the AAT on its membership, including both the machinery of member appointments and their qualifications more generally, cannot escape notice.

Indeed, reading the reports, one is often left with the impression that the key features of how merits review ought to operate are increasingly agreed upon. (For instance, there do not appear to be any calls for the rules of evidence to apply strictly to merits review bodies.) The critical question for our times is how to ensure that a merits review body has the right personnel in the right places to execute effectively within these processes.

In the taxation context, it is instructive to start consideration of this point with reference to the former taxation boards of review. Interestingly, the boards were composed of three members, "one legal member, one accounting member, and one ex-departmental officer with experience in the taxation field".[90] That is, they were multi-member tribunals with the experience to understand the law and practice of taxation disputes.

In its 1983 report, the ARC compared this process to the AAT:

> When constituted as a full Tribunal, the AAT adopts a similar membership format. Drawn from the pool of available members the most common combination is a senior member (an experienced legal practitioner) and two part-time members with expertise in the relevant area. A significant difference between the Boards and the AAT, however, is the range and variety of experience and expertise of AAT members. When coupled with the ability of the Tribunal to vary its constitution and to reconstitute itself in appropriate cases, this difference can lead to important advantages. Of particular note is the availability of Federal Court Judges as presidential members.[91]

Subsequently, the ARC considered that, in light of the small sums in dispute in many matters, the flexibility of the AAT to constitute only one member to a matter was a real benefit it held over the boards of review, which were limited to the rigid three-member structure.[92] This arrangement assumes, however, that:

(a) a "subject matter expert" member will be accompanied by at least one who is legally trained; and

(b) the AAT will have the resources to be able to match each matter to the member or members who might be best suited to determine it.

90 Administrative Review Council (n 47) [98].
91 Ibid [99].
92 Ibid [114], [151].

Although the AAT has recently been constituted by multi-member tribunals, with legal and subject-matter expertise,[93] this is far from the norm. Rather, the practice of constituting multi-member tribunals has largely ceased.

One might be forgiven for assuming that this has been a recent development arising from budgetary pressures. Given the AAT's enormous caseload, a multi-member tribunal might be seen as a luxury which can ill be afforded. However, it appears that multi-member tribunals in the taxation jurisdiction were never as prevalent as the ARC's report suggested they might be. In its first full year after replacing the Board of Review, the AAT conducted 818 substantive hearings in its taxation jurisdiction, of which 103 were conducted by multi-member tribunals.[94] Although we have been unable to locate data on the recent prevalence of multi-member tribunals on taxation matters, anecdotally their prevalence has decreased dramatically from the heights of 103 in 1986/87.

In his submission to the Senate Legal and Constitutional Affairs References Committee's recent review into the AAT, Professor Weeks suggested that increasing the number of multi-member tribunals could be an effective way of ensuring the sufficient degree of qualifications hear matters.[95]

We agree, particularly in the taxation context. The complexities of the tax system, subject matter and laws favour the presence of legally qualified members, as was recognised by the ARC in 1983.[96] However, to restrict membership to legally qualified individuals would impose an unfortunate limitation on the range of experiences which can and should qualify a person for membership. This is exemplified by the observation that many accountants are far more familiar with tax law than most lawyers and have greater facility with numbers.

At a minimum, the addition of specialised accounting knowledge or other subject-matter expertise could amplify the quality of the decision-making on a multi-member tribunal. Further, it could have benefits even when those members are not sitting together. Sitting on a multi-member tribunal could lead to a sharing of experiences and cross-fertilisation of ideas which would improve the standard of each individual member's decision-making.

Being able to draw on a membership body with a range of experiences is consistent with the benefit of having a decision being reviewed by "business men", identified by the Privy Council in *Shell*. That is, in circumstances where taxation appeals may touch on almost all of human experience (the AAT has in the last decade determined taxation matters concerning

93 See, eg, *Thomas and Secretary, Department of Defence (Freedom of information)* (2018) 74 AAR 379, where the Tribunal was constituted by Logan J, DP Hanger and SM Nikolic. While all three Members had military experience, Senior Member Nikolic, who was not legally trained, was formerly a Brigadier in the Australian Army.

94 Chapple, "Have the Administrative Appeals Tribunal and associated changes improved the resolution of taxation disputes?" (n 61) 249. In 1987/88, these figures were 1,348 and 89, respectively. In 1988/89, they were 923 and 41, respectively.

95 Greg Weeks, Submission No 7 to the Senate Legal and Constitutional Affairs References Committee, *The Performance and Integrity of Australia's Administrative Review System* (2 November 2021) 4–5.

96 Administrative Review Council (n 47) [99].

residency,[97] superannuation,[98] property development,[99] luxury cars,[100] and brothels,[101] to give some flavour of the variety of matters which arise), there is an innate benefit to being able to draw on a membership coming from different walks of life.

For example, a member who has advised on major international transactions may be better placed to understand an international transfer pricing arrangement than one who has not. Conversely, a member who has previously worked as an accountant for small businesses may be in a more advantageous position to understand and determine small business tax arrangements.

The proposition that accountants should be appointed to the AAT's taxation matters has found support in some potentially unexpected places. The Callinan Report, which generally favoured the appointment of lawyers only to the AAT, singled out the Taxation and Commercial division as a possible exception "to which competent accountants might be appointed".[102] This perspective was echoed by the NSW Bar Association's submission to the Senate Committee.[103] If adopted in concert with an increase in multi-member tribunals, there is no reason that accountants would not be able to maintain an appropriate standard of decision-making in taxation cases. It bears observation that the benefits of viewpoint diversity and subject-matter expertise described above apply to fields beyond accounting.

A further point made by the ARC emphasised the benefit in being able to appoint judicial members to hear significant matters in the AAT.[104] After the transition of taxation matters to the AAT, this did prove to be a significant benefit, especially where taxpayers had concurrent AAT and Federal Court appeals. An example was given by Logan J in *King v Commissioner of Taxation*, where his Honour observed that such arrangements

> presented a convenience in circumstances like the present in that a taxation appeal might be determined by an exercise of judicial power and a remission of penalty review by an exercise of executive power but by the one person, on the one occasion and, usually but not always, on one body of evidence. However, the practice did bring with it the possibility of a need for careful differentiation as between the basis for the exercise of judicial power and the basis for the exercise of administrative power, because the exercise of the latter, unlike the former, was not conditioned upon the tendering of admissible evidence, only material reasonably capable of engendering administrative satisfaction.[105]

This practice, too, has in recent years been diminished.[106]

The allocation of taxation matters with the same applicant in the Federal Court and AAT to the same judicial member remains a considerable benefit of the retention of judicial members

97 *Shord and Commissioner of Taxation* [2015] AATA 355.
98 *GDGR and Commissioner of Taxation* [2020] AATA 766.
99 *Earlmist Pty Ltd atf Earlmist Unit Trust and Commissioner of Taxation* [2023] AATA 978.
100 *Trustee for Star Enterprises Trust and Commissioner of Taxation* [2020] AATA 1656.
101 *HKYB and Commissioner of Taxation* [2018] AATA 4770.
102 IDF Callinan AC, *Review: Section 4 of the Tribunals Amalgamation Act 2015 (Cth)* (Report, 2018) 9.
103 NSW Bar Association, Submission No 26 to the Senate Legal and Constitutional Affairs References Committee, *The Performance and Integrity of Australia's Administrative Review System* (2 November 2021) 2–3.
104 Administrative Review Council (n 47) [98].
105 *King* (n 80) [5].
106 Ibid [6].

of the AAT. It reduces the risk of inconsistent findings on the same facts and avoids the unnecessary duplication of costs by both the taxpayer and the Commissioner. At least in the taxation context, this practice should be retained and continued to be used in appropriate cases.

The final point worth considering in respect of membership is that, somewhat paradoxically, efficiency in decision-making may be improved by giving the members more time to consider and make their decisions, not less. In its interim report, the Senate Legal and Constitutional Affairs References Committee referred to submissions which argued that the "increasing complexity of cases before the AAT, including tax cases" warranted greater resourcing of members to reduce any backlogs in the system.[107] This is a well-made observation. When members are overloaded with cases, they may not have the space or time in which to do the deep thinking and research which taxation matters often require. Putting aside its potential impacts on the *quality* of decision-making, an overloaded membership is likely to take more time to make its decisions.

It follows from the above that, in determining the membership of any merits review body, the following features should be emphasised:

(a) Due to the complexities of taxation law and policy, decision-makers should have a requisite level of training and skill to be able to navigate the tax system.

(b) However, one of the strengths of a modern tribunal lies in its ability to draw on a diverse membership, with members who bring different life and professional experiences, including (but not necessarily limited to) accountants.

(c) Holding multi-member tribunals should be retained and expanded, to improve the overall quality of decision-making (especially where one of the members is not legally qualified).

(d) Similarly, the ability to have judicial members sit simultaneously on related AAT and Federal Court proceedings should be retained.

(e) Ultimately, any merits review body must be sufficiently resourced to be able to carry out its functions properly. Due to the complexity of many tax disputes, the need for members to have sufficient time to consider properly the matters assigned to them is critical to the interests of justice.

There is an exogenous factor affecting recruitment. The conduct rules of the legal profession prevent a former tribunal member appearing before the tribunal for two or five years.[108] This neutralises years of expertise once a member leaves a tribunal, and thus potentially

107 Senate Legal and Constitutional Affairs References Committee, *The Performance and Integrity of Australia's Administrative Review System* (Interim report, March 2022) [3.9].

108 Rule 101A(3) of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* has reduced this to two years, but the equivalent Queensland rule remains five years: *Barristers' Conduct Rules* (Qld) r 95(n).

discourages subject-matter experts from seeking appointment in the first place. (Federal law could presumably override these state-based conduct rules.)

Other key features

Speed and efficiency of decision-making

In its 1983 report the ARC observed that, as at 30 June 1982, there was a delay in obtaining a hearing before the three boards of review of 18 months, 29 months and 9 months, respectively.[109] The ARC described these delays as giving rise to a "need for concern".[110] This should be compared to the numbers reported in the AAT's 2021/22 annual report, which showed that the AAT finalised 82% of all Small Business Taxation division matters, and 59% of all Taxation and Commercial division matters, within 12 months of filing in 2021/22,[111] with median times to finalise of 29 weeks and 39 weeks, respectively, for the two divisions.[112]

Thus, while delay in the AAT is not as excessive as was the case under the boards of review, it remains significant. In light of the penalties and interest applied in respect of disputed amounts, there is a particularly pressing issue in respect of the efficient resolution of taxation matters. Against this, however, we note that taxation matters are also often some of the more factually and legally complex matters dealt with by the AAT, so it is not unreasonable to expect that it will take longer to make decisions in its taxation jurisdiction than it would in some of its other jurisdictions. We also observe that the complexity of taxation matters is a strong reason for ensuring a right to be legally represented in external merits review proceedings, to ensure that proper submissions which assist the tribunal can be made.

Effective pre-hearing dispute resolution procedures

In the early days after the transfer of the merits review function from the boards of review to the AAT, its alternative dispute resolution practices were considered to be some of the "most important facets of the Tribunal's procedure".[113]

It remains the case that the AAT's alternative dispute resolution practices are an important element of its procedure. Further, the presence of the logistical machinery (including, relevantly, conference registrars), in the AAT provides a compelling reason for not spinning off a separate taxation tribunal — the cost of losing and having to re-establish that institutional knowledge would be great.

109 Administrative Review Council (n 47) [117].
110 Ibid [118].
111 Administrative Appeals Tribunal (n 5) 28.
112 Ibid 66.
113 Chapple, "Have the Administrative Appeals Tribunal and associated changes improved the resolution of taxation disputes?" (n 61) 249.

Confidentiality

Generally, the AAT holds its hearings in public, unless it is satisfied that an order for non-publication or non-disclosure should be made under s 35 of the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*). However, for appeals to the Tribunal, taxpayers have two additional rights:

(a) under s 14ZZE of the *Taxation Administration Act 1953* (Cth), they may request a private hearing in the AAT; and

(b) under s 14ZZJ of that Act, the AAT's reasons must be framed so as not to be likely to enable the identification of the applicant.[114]

Although these rights do not extend to an express right to have the publication of evidence restricted, the courts have held that

> Parliament has conferred an express right on parties to certain taxation matters before the Tribunal to have the hearing in private. It does not confer any express right for a party to have the publication of evidence before the Tribunal prohibited or restricted. On the other hand, having regard to the terms of s 4ZZE, it would be a most unusual case where the Tribunal, if asked, did not give the directions that are contemplated by s 35(2) in a proceeding to which s 14ZZE applies. The Tribunal is empowered to give such directions for any reason, where it is satisfied that it is desirable to do so. Where a party exercised the right, under s 14ZZE, to have a hearing in private, that would be a very cogent reason for the Tribunal to make an order under s 35(2)(b).[115]

Notably, this regime has been held not to apply automatically on appeal from the AAT to the Federal Court. In *Herald & Weekly times Ltd v Williams*, Merkel J held that

> there is nothing in the *Taxation Administration Act* or the *AAT Act* which evidences a legislative intention that the privacy or confidentiality that might prevail when a matter is before the AAT should continue once a proceeding, which arises out of or relates to the matter in the AAT, is commenced in the court.[116]

This distinction in approach is derived from the administrative, as opposed to judicial, function adopted by the AAT.[117] By extending an automatic right to a private hearing to AAT proceedings, Parliament has implicitly accepted that being involved in tax litigation can adversely impact a taxpayer's reputation. While the *administrative* processes are ongoing, it has determined that a taxpayer should be entitled to a degree of privacy over their personal affairs and information. This regime should remain in place for any future merits review tribunals.

Multiple tiers of external merits review?

The IGTO *Interim Report* discloses that only a small proportion of objection decisions are then the subject of an external review, as shown in figure 1.[118]

114 See also *VNBM and Commissioner of Taxation* (2021) 175 ALD 538, 539 [6].

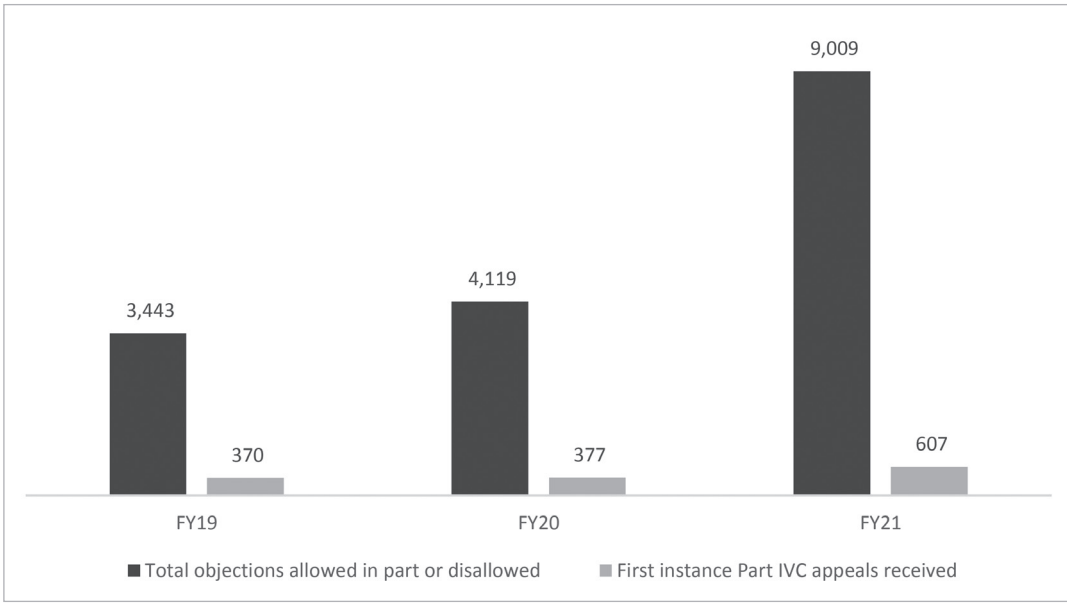
115 *Brown v Commissioner of Taxation* [2001] FCA 276. This distinction is significant, and one area for future reform may be to create a more general right to privacy under the *TAA* (n 9) in external review of taxation cases, rather than relying upon an application under s 35 of the *Administrative Appeals Tribunal Act 1975* (Cth).

116 *Herald & Weekly times Ltd v Williams* (2003) 130 FCR 435, 442 [28].

117 Ibid.

118 IGTO, *Interim Report* (n 33) [6.51].

Figure 1. Finalised objections vs Part IVC appeals commenced in the Administrative Appeals Tribunal or the Federal Court



Note: The number of appeals/reviews includes some cases where there was no objection decision made (and the Tribunal has no jurisdiction to make a decision).

Source: Inspector-General of Taxation (IGTO), *The Australian Taxation Office's Administration and Management of Objections* (*Interim Report*, October 2022) [6.51], figure 6.55. Reproduced from the IGTO under a Creative Commons Attribution 3.0 Australia Licence.

This is a notable discrepancy, and raises the question of whether there is scope for two tiers of external merits review in the taxation system. To answer this question, one must first consider why this discrepancy exists.

One potential answer is the cost of seeking review of an objection decision. A striking feature of the literature around the time the taxation merits review jurisdiction was transferred from the Board of Review to the AAT is that the Tribunal's application fees were significant, compared to the notional fees charged by the boards. Chapple observed that

> [t]he Boards offered a cheap service for the taxpayer as the only unavoidable cost was the nominal $2 refundable fee. This left the system open to abuse from frivolous or tactical objections from taxpayers (who often withdrew just prior to the hearing) and was a contributing factor to delays in the system.[119]

119 Chapple, "Have the Administrative Appeals Tribunal and associated changes improved the resolution of taxation disputes?" (n 61) 255–6.

Conversely, while appeals to the AAT were initially free, they were soon increased to $300, refundable in the event of a successful appeal.[120] Higher fees in the AAT were originally justified on the grounds that

> [i]t is necessary to produce practical means of filtering out less important issues in full and brutal realization that if we seek perfect justice in every individual case, we may well be decisively compromising the quality of justice delivered by the tax system as a whole.[121]

The filing fee is presently $581 in the AAT's Small Business Taxation division, and $1,082 in its Taxation and Commercial division, unless, relevantly, the amount of tax in dispute is less than $5,000, in which case the fee is $107.[122]

This would suggest that the fears of the AAT becoming swamped by low-level taxation review applications has abated, but not because of the increased application fee compared to the Board of Review.

One possible explanation is the cost of running a proceeding in the AAT. While the cost of legal representation would likely far exceed the amount in dispute in a matter attracting the lower application fee, there is also a question of fatigue on the part of the taxpayer when faced with the daunting prospect of taking an appeal to the AAT as a layperson.

Another possible explanation is more prosaic: the ATO may have been correct in its objection decision.

In the circumstances, and on the basis of the data presently available, there does not appear to be the need for a two-tier external merits review system.

Conclusion

The results of our survey of the Australian tax system are not as negative as one might have assumed at first blush. Particularly in light of the enormous volume and diversity of matters which it deals with, it is apparent that the ATO largely administers tax laws effectively and efficiently. However, we recommend that the following occur in order to ensure that the administration of the Australian tax system remains fit for purpose.

First, while the PBR regime should be maintained, it is important to recognise its limitations and investigate alternative mechanisms of providing forward guidance for transactions that are dynamic, or which have complex facts. In the cases of such transactions or arrangements, it may be important for taxpayers and the Commissioner alike to be more creative and open-minded in the ways in which they respectively seek and provide guidance. We coped with non-binding letters of comfort before 1992, and this option remains open where a PBR is problematic.

120 Ibid 250.

121 Robin Woellner, "An analysis of the new taxation process" (1987) 4 *Australian Tax Forum*.

122 Administrative Appeals Tribunal, "Taxation and Commercial — Fees" (Web Page) <https://www.aat.gov.au/apply-for-a-review/taxation-and-commercial/taxation-and-commercial/fees>.

Second, the IGTO's *Interim Report* shows the value of ensuring high-quality data are kept in respect of all aspects of the taxation administration system. Such data have the potential to give interesting and important insights into how the ATO administers the Australian taxation system, and what does and does not work.

One insight which appears from the data presently available is that a significant proportion of objection decisions set aside the assessment at least in whole or in part. We note that this pattern does not appear to arise from poor quality decision-making by the ATO in *making assessments*. Rather, it often arises from taxpayers objecting to their own self-assessments, leading to "churn" and inefficiencies. Although more work is required to confirm these conclusions, consideration needs to be given to methods of providing better guidance before self-assessments are lodged in order to reduce this churn.

Third, there are strong reasons for maintaining a single tier of external merits review of objection decisions in whatever system replaces the AAT. Key aspects of the current regime, including confidentiality for taxpayers, the right to legal representation, and alternative dispute resolution, should be maintained. Also, there are significant benefits in retaining a diverse membership of such a body, potentially including non-legal members such as accountants.

However, this should be balanced by an increase in resourcing for the body, including by providing for a greater number of multi-member tribunals. Further, the practice of appointing Federal Court judges and making them available to the tribunal to hear and determine taxation cases should be re-invigorated and re-emphasised. At the time of the transfer to the AAT from the Board of Review, it was seen as a significant benefit to shifting to the AAT. That remains the case.

Balancing transparency and secrecy in public criminal intelligence reports

Michael Barnes, Kelly Roberts† and Nathan Leivesley‡*

This article discusses whether the risks associated with the exercise of the coercive powers granted to the NSW Crime Commission and the secrecy provisions under which it operates are sufficiently constrained by safeguards and oversight mechanisms to ensure proportionate outcomes that are in the public interest. It questions whether the harm done to the public interest by the state overriding citizens' traditional civil rights can be justified by the need to reduce the harm caused by rampant organised crime.

The article begins by describing the role and function of the Commission, and contrasting its usual means of operating with its recent publication of an intelligence report containing recommendations for public policy reform. The article then examines the different challenges of balancing secrecy and transparency in this new, more public-facing product, and how that requires the balancing of a different harm/benefit equation. In particular, how to provide the transparency needed to enable the Commission's conclusions to be critiqued and its assumptions to be checked, while keeping secret information that could compromise the effectiveness of the Commission's methodology or cause undue prejudice to those who assisted it or were targeted by it.

The thesis of this article is that the Commission can and should appropriately balance secrecy and transparency when producing public-facing criminal intelligence products that contribute to public policy development with the aim to reduce organised crime.

The Commission

The NSW Crime Commission is a statutory corporation of the New South Wales Government[1] charged with responsibility to prevent, disrupt and reduce the incidence of organised and other serious crime in New South Wales.[2] It has coercive powers akin to a standing royal commission, with the mandate for those coercive powers to be exercised in secret.[3]

The Commission was constituted in 1985 as the State Drug Crime Commission,[4] in a context where organised crime was considered to have penetrated deeply into the NSW Police Force and traditional law enforcement approaches and methods did not seem to have been effective. It departed from the traditional law enforcement model by leveraging the experience of professional civilians rather than police officers, employing intelligence analysts, lawyers and forensic accountants to exercise not only standard law enforcement methods (search warrants, information gathering, use of informants), but also extraordinary powers similar

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1 *Crime Commission Act 2012* (NSW) s 3 (*CCA*).
2 Ibid s 7.
3 See ibid ss 21 and 45 requiring hearings to occur in private and subject to statutory non-publication orders, and s 81 prohibiting the disclosure of the existence of hearing summonses or notices compelling the production of information.
4 By the *State Drug Crime Commission Act 1985* (NSW).

to a standing royal commission. Presumably, the policy underpinning these arrangements was that the extraordinary powers should only be exercised by a Commissioner or Assistant Commissioner with "special legal qualifications" after general approval had been given by a management committee chaired by a retired judge.[5]

The current *Crime Commission Act 2012* (NSW) (*CCA*) commenced after the 2011 Special Commission of Inquiry into the NSW Crime Commission (Patten review).[6] The Patten review found the then existing accountability measures were inadequate and recommended changes, most of which were implemented in the 2012 Act.[7] Justice Patten also recommended several measures aimed at increasing the transparency and proportionate use of the Commission's powers.

The Commission's resources, powers and methods

The Commission is staffed by approximately 135 lawyers, accountants, intelligence analysts, and other professional and support staff. These staff members exercise the Commission's statutory powers; capabilities that are exercised without guidance of specific legislation; capabilities made available under other NSW legislation; and powers authorised by Commonwealth legislation.

The primary source of powers available to the Commission is the *CCA*. The Commission is empowered to summons witnesses to appear in private and answer questions without a right to silence, and to require the production of documents or things in secret to inform its investigations into organised or serious criminal offending.[8] It can also compel the production of documents from individuals, corporations and government entities.[9]

This information informs investigative decision-making directly, by progressing a specific investigation arising out of the Commission's primary functions,[10] or by forming part of a broader pool of intelligence regarding organised or serious criminal activity which is shared with law enforcement partners.

Under New South Wales legislation, the Commission is empowered (like other law enforcement agencies) to apply for warrants to install and maintain various surveillance devices in furtherance of an investigation,[11] as well as to create and use assumed (false, but legitimate) identities for investigative activities.[12]

The Commission also maintains a telecommunications interception capability, allowing it to intercept phone calls and acquire other telecommunications data where it is lawful to do so under the *Telecommunications (Interception and Access) Act 1979* (Cth).

5 *CCA* (n 1) sch 1 cl 1.
6 David Patten, *Report of the Special Commission of Inquiry into the New South Wales Crime Commission* (30 November 2011).
7 Ibid 6–16.
8 *CCA* (n 1) s 39.
9 Ibid ss 28, 29.
10 See ibid s 10.
11 *Surveillance Devices Act 2007* (NSW) s 17.
12 Pursuant to the *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW).

The Commission's human source intelligence capability is delivered by specialist intelligence officers who cultivate and maintain relationships with people from all walks of life, including members of the criminal milieu, who provide valuable criminal intelligence. This capability is able to be delivered as a result of the Commission's longstanding expertise in investigating organised and serious crime rather than from codification in any specific legislation.

The information that the Commission acquires from the exercise of these powers and methods enables it to develop a broad and deep understanding of what is happening in organised crime networks, and to investigate, prevent and disrupt serious offending.

Investigations aimed at gathering evidence and intelligence

The majority of the Commission's investigative work revolves around intensive — and sometimes years long — investigations of particularly sophisticated individuals or criminal networks engaged in organised or serious criminal offending. These investigations aim to provide evidence (or intelligence and information that can lead to the acquisition of evidence) in support of a criminal prosecution of persons of interest or to fill intelligence gaps more generally.

The Commission also has functions and powers under the *Criminal Assets Recovery Act 1990* (NSW) (*CARA*) that include applying to the Supreme Court for orders restraining property and freezing bank accounts; examining witnesses on oath; issuing notices to produce documents; and forfeiting property to the state. All the powers conferred on the Commission by the *CCA* can also be used, to varying extents, to advance *CARA* investigations.

Traditional law enforcement

Traditional law enforcement models require governments to invest powers and functions in law enforcement agencies that are reasonable and proportionate to the social harm that agencies are working to prevent or disrupt. Transparency and oversight mechanisms are critical to this "social contract" whereby citizens invest trust in government to make decisions that may impinge upon traditional rights, but with the benefit of reducing the probability that they will be impacted by crime.

In deference to civil rights, the powers of police forces are limited by reference to key principles such as the right to silence and the freedom from interference with one's person or property. Absent adherence to these principles, the rule of law could falter if a police officer could stop, compulsorily question, and search a person for any reason or no reason at all. Obviously, this would be untenable. However, in certain narrow circumstances, interference with these fundamental rights in specific ways and with clear guards against arbitrariness can be justified and proportionate — it is in this narrow space where the Commission operates.

The need for more powerful agencies

By their nature, organised crime networks (OCNs) are more resistant to traditional law enforcement activity. They engage in systemic and ongoing extreme violence that makes victims and witnesses less likely to cooperate with police — the code of silence. They have

access to huge amounts of money, which enables the hiring of agents who undertake the criminal acts but are kept remote from the principal organisers, who are insulated from criminal responsibility. This wealth also enables OCNs to access highly sophisticated communications and other technology; to bribe "insiders"; and to acquire the services of legal and financial professionals. They are increasingly controlled by individuals located in foreign countries. OCNs strategically, deliberately and often effectively attempt to subvert traditional law enforcement methods.

Organised crime poses a risk of diverse and serious harms to society: drug addiction with health complications and lost productivity; cybercrime and identity fraud; child sex abuse and human trafficking; murder and public place extreme violence; kidnapping and extortion; market distortion and unfair competition with lawful operators; corruption of public officials; and even national security ramifications.

Having regard to the limited effectiveness of combating OCNs via traditional policing methods and the extreme harm they cause, overriding the protection of some civil rights is justified, provided the exercise of the power to do so is appropriately constrained.

It is on this basis that the NSW Crime Commission has been given the extraordinary powers and adopts the methods outlined earlier. The article will now address whether the constraints and oversight mechanisms that apply to the exercise of these powers are sufficient.

Oversight mechanisms

There are a variety of mechanisms that are designed to safeguard the exercise of the extraordinary powers given to the Commission and to ensure that its processes are proportionate to the harm their exercise aims to address.

Although the various oversight mechanisms described below have differing powers, responsibilities and particular areas of focus, in combination they enhance the Commission's operations by supporting its continual improvement from an accountability and probity perspective. Their independence and regulatory "teeth" provide a critical mechanism to ensure public confidence in the Commission's responsible use of its significant powers. If the Commission behaves inappropriately, there are both declaratory and enforceable interventions that oversight bodies can utilise to bring the Commission back on track. These interventions become more stringent and enforceable the more serious the concern.

Statutory constraints

The *CCA* provides critical integrity measures. This includes the requirement that the Commissioner and at least one Assistant Commissioner have "special legal qualifications" equivalent to judicial qualifications,[13] making it more likely the exercise of the Commission's powers will conform with the relevant legal requirements in the *CCA*.

13 *CCA* (n 1) s 9, sch 1.

In addition, a person giving evidence in a hearing before the Commission has a right to be legally represented,[14] further helping to ensure that the Commission's powers are not used in arbitrary and capricious ways, by giving witnesses an express right to apply to the Supreme Court if the Commission overrides objections to answer questions within a hearing or to produce information or documents.[15]

The *CCA* also provides various mechanisms to ensure that coercive hearings involving a person of interest subject to current criminal charges are not able to be used against that person in the criminal proceedings, thereby maintaining a separation between the coercive powers that could be said to impinge on traditional rights, such as hearings, and the more typical criminal justice processes. For example, s 35A provides that a person who is the subject of a current charge for an offence cannot be questioned by the Commission in a hearing or be forced to produce a document or a thing without the Commission seeking leave from the Supreme Court. If leave is granted, the evidence obtained cannot be used against that person, and the Supreme Court may only grant leave if it considers that the potential prejudicial effect is outweighed by the public interest.

Section 45 provides that the Commission *must* make a non-publication direction if the failure to do so might prejudice the safety or reputation of a person, or might prejudice the fair trial of a person who has been or may be charged with an offence.

In addition to the guidance and limitations offered by the *CCA* itself, there is a well-developed governance and accountability framework that operates to provide oversight and guide the operations of the Commission, including an independent management committee and other important supervisory bodies such as the NSW Parliament and the Law Enforcement and Conduct Commission (LECC).

Management Committee

Critically, the Commission's significant coercive powers to compel witnesses to give evidence can only be utilised once a matter is referred to the Commission from the Commission's Management Committee.[16] The legislation provides that, broadly, the Management Committee is not to refer a matter to the Commission for investigation unless it is satisfied that the use of the Commission's powers appears to be necessary, the investigation is in the public interest, and the relevant criminal activity is sufficiently serious or prevalent. The Chair of the Management Committee is independent and must be a former judge, and has a deliberative vote. The Management Committee has the power to issue directions and furnish guidelines to the Commission regarding the exercise of its functions, and the Commission must comply with these directions and guidelines.[17] The Commission also has a legislative obligation to keep the Management Committee appraised of its operations, particularly in regard to warrants issued under s 36 (warrant to arrest a witness who is non-compliant with a coercive hearing process) of the *CCA*.[18]

14 Ibid s 22.
15 Ibid s 33.
16 Ibid ss 24(3), 54.
17 Ibid s 57.
18 Ibid s 59.

NSW Parliament

The Parliamentary Joint Committee on the Office of the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission (PJC) is a statutory committee of the NSW Parliament which oversights a number of agencies, including the NSW Crime Commission.[19] The Commissioner is also routinely required to appear before Budget Estimate hearings of the Public Accounts Committee, with the Minister for Police.

Law Enforcement and Conduct Commission

The LECC provides oversight of the NSW Crime Commission, with a statutory mandate to detect, investigate and expose officer misconduct, and to provide educative and preventive functions.[20] To assist it in fulfilling its mandate, the LECC has coercive statutory powers similar to those of the Commission: the LECC can conduct coercive hearings in public or in private in furtherance of investigations of misconduct or maladministration,[21] and can compulsorily require the production of information, documents or other things.[22] These powers, in combination with an explicit exception to the Commission's usually stringent secrecy provision,[23] give the LECC a deep and wide-ranging ability to supervise the lawfulness and ethics of the Commission's operations and decision-making.

The Inspector of the LECC monitors (among other things) surveillance device deployments, the use of controlled operations (where in limited circumstances crimes can be committed lawfully), and telecommunications interception by the Commission, the LECC, and other relevant New South Wales agencies.[24]

Commonwealth Ombudsman

The Commission's use of telecommunications data and stored telecommunications product is reviewed by the Commonwealth Ombudsman.

Informing policy rather than arresting criminals

Until recently, the Commission has largely focused on investigations aimed at arrests and convictions. It is submitted that the harm caused by OCNs is such that resort to the Commission's extraordinary powers (appropriately constrained) to apprehend and prosecute the perpetrators of such crimes is justified.

The establishment of a Strategic Intelligence Unit within the Commission and the unit's first major project marks a broadening of the Commission's utilisation of its statutory functions.

19 Ibid s 71.
20 *Law Enforcement Conduct Commission Act 2016* (NSW) s 3, pt 4.
21 Ibid s 62.
22 Ibid ss 54, 55.
23 *CCA* (n 1) s 80AA(1)(d).
24 *Law Enforcement Conduct Commission Act 2016* (NSW) s 122; *Surveillance Devices Act 2007* (NSW) s 48; *Law Enforcement (Controlled Operations) Act 1997* (NSW) pt 4; *Telecommunications (Interception and Access) (New South Wales) Act 1987* (NSW) pt 3.

This enables the Commission to venture increasingly into the prevention and disruption of serious and organised crime, in addition to utilising its powers to solve serious and organised crime. This broadens the focus of the Commission from individuals and OCNs to criminal processes, systems and methods, with the aim of disrupting them to prevent their exploitation by offenders.

This disruptive and preventative model is supported by s 10(1)(e) of the *CCA*, which authorises the Commission "to furnish in accordance with this Act reports relating to organised and other crime, which include, where appropriate, recommendations for changes in the laws of the State". When linked with the overarching requirement for the Commission to reduce, prevent and disrupt organised crime, s 10(1)(e) can be seen to authorise the Commission to examine systems or environments which create opportunities for organised criminality to flourish.

This different approach to the Commission's core functions calls for a re-examination of how the risk of abuse of power is to be balanced against the potential public benefit in contributing to the development of effective policy on crime prevention. For a public report to have impact via actionable, evidence-based recommendations and to be credible, it needs to provide transparent analysis of the evidence, and the methods and tools used to gather that evidence, to the greatest extent possible. However, it also needs to maintain confidentiality in relation to tradecraft if it is to remain effective and to protect individuals who may suffer personally or legally if their contribution to the project were published. This tension between transparency and secrecy gives rise to a balancing exercise that differs from that undertaken in the more usual prosecution-focused investigations.

Case study: Project Islington

In October 2022, under s 10(1)(e) of the *CCA*, the Commission released a public report that examined the use of electronic gaming machines (EGMs) in pubs and clubs for money laundering (Project Islington or "the Inquiry"). To compile this report, the Commission used its coercive powers to compel people to attend hearings in secret, for the purpose of gathering evidence, as well as to obtain large swathes of data which was analysed as part of the investigation. The Commission also deployed its human source capability and other covert evidence-gathering capabilities to support this investigation.

The preface to the Project Islington report stated:

> In 2020–21, approximately $95b was gambled through EGMs in hotels (pubs) and licensed clubs in New South Wales. Concern has increased that the magnitude of this cash flow has made EGMs attractive to criminals as a mechanism for laundering money to make it appear legitimately acquired. Amid these concerns, shared by law enforcement agencies and Government, the NSW Crime Commission (NSWCC) identified the need for a detailed investigation in accordance with its principal function to furnish reports relating to organised and other crime and, if appropriate, to make recommendations for law reform.
>
> …
>
> Accordingly, the Commission sought and obtained from its Management Committee a reference to undertake the Inquiry … The Inquiry was undertaken in the same way as any organised crime investigation. Electronic and physical surveillance was undertaken on persons of interest, intelligence holdings were extensively analysed, and coercive hearings were held. In addition, data matching and data analytics was undertaken; a literature review was done; and legal authorities were analysed.

> The Inquiry used both a top-down and a bottom-up approach to its investigations. Individuals who had been featured in the media as being involved in money laundering were identified and investigated. At the same time, the conduct of others who had not come to the public attention, but who were known to or identified by the Inquiry team due to their involvement in money laundering and/or gambling were examined. The Inquiry was an intelligence probe, a research project that did not commence with a case theory; the investigative agencies bore no burden of proof. The Inquiry team simply sought to establish the extent to which money laundering via EGMs is occurring and to identify vulnerabilities that could be addressed.[25]

Project Islington was both an intelligence probe and, ultimately, a law reform project. The project team was able to bring together criminal intelligence, much of which was gained via covert methods, with a more traditional policy process: open-source research, analysis of case law, and written submissions from stakeholders. The result was an evidence-based report that influenced more widely than traditional criminal intelligence. With the report published only a few months ahead of the NSW state election, it resulted in both major parties responding with policies aimed at addressing the issues identified in the report.

To establish whether media reports of widespread money laundering via EGMs were accurate, the Commission utilised its powers to gather evidence by the coercive means discussed above. Persons of interest identified using intelligence collation and analysis were summoned to closed hearings and required to respond to questions about their gambling and other relevant activity.

Commonwealth and state regulatory and partner agencies shared data from their immense holdings and assisted with the analysis of that data. Human sources were debriefed and, where appropriate, electronic and physical surveillance was undertaken.

The Commission also brought policy expertise into the Inquiry team, to produce evidence-informed policy recommendations. By combining and assessing the hearing product with other criminal investigative evidence, data from diverse sources and solid policy analysis, the Inquiry was able to make findings underpinned by solid evidence.

Balancing secrecy and transparency in public reports

Agencies such as the Commission cannot always consistently and transparently demonstrate to the public the true value of criminal intelligence gathering. This is because it is mostly done behind closed doors, for very good reason.

However, Project Islington demonstrated the cross-over between criminal intelligence gathering and public policy development, and provided a case study in how, despite a lack of complete transparency, covertly gathered criminal intelligence can still add significant value to the public policy process, and influence outcomes that support broader reforms.

The focus of public-facing intelligence is gathering the most amount of quality information effectively and securely and then communicating, to the greatest extent possible, the

25 NSW Crime Commission, *Project Islington Inquiry into Money Laundering via Electronic Gaming Machines in Hotels and Clubs* (Report, 27 October 2022) <https://www.crimecommission.nsw.gov.au/final-islington-report.pdf> iii–iv.

methods, analysis and conclusions. It is this transparency that assists to give the published product credibility. In contrast, in more traditional criminal investigations, the focus is on maintaining confidentiality and secrecy of an investigation so as not to prejudice the outcome of that investigation by the targets becoming aware and taking steps to conceal their activity. Even when a matter goes to trial, it is only the evidence that is produced, not necessarily (for various reasons) the intelligence products that led to that evidence being secured.

While the same powers and functions may be utilised in both types of investigations, the Commission must give the same statutory criteria differing focus, consideration and weighting depending upon what is to happen with the investigative product. For example, s 45(2) of the *CCA* provides that the Commission *must* make a non-publication direction in relation to evidence given in its coercive hearings if a failure to do so might prejudice the safety or reputation of a person, or the fair trial of a person who has been or may be charged with an offence. Obviously, these factors are weighed differently when a public-facing intelligence report is being produced, as distinct from when a person of interest is suspected of an unsolved homicide. When a public-facing intelligence report is being produced, the evidence is not being gathered for possible production at court in the trial of an individual accused of a specific offence, but rather to be shared with the public and government policy-makers. This makes the decision about non-publication directions very different: anonymous evidence will be inadmissible at trial but can be completely adequate as a basis for policy formulation.

That does not mean that the risk of harm to a witness or their reputation or fair trial can be ignored when they are called for a Project Islington-type purpose: a witness compelled to give evidence about the Anti-Money Laundering & Counter-Terrorism Financing processes of their employer may justifiably be concerned about the impact of their evidence on their employment. Similarly, a convicted drug dealer compelled to answer questions about the quantum of the proceeds they derived is entitled not to have that disclosed to prosecutors.

These challenges were managed by starting with blanket non-publication orders under s 45(1) of the *CCA* and then identifying, on a case-by-case basis, what information was needed to be included in the report to fill the targeted intelligence gaps. In no case did that require a witness to be identified. In each case the witness was consulted before their evidence was included in the report and they were given an opportunity to comment on what was proposed to be included. These views were then taken into account when the Commissioner made any variation to the s 45(1) non-publication orders.

Similarly, s 45 was utilised to minimise harm to people in circumstances where the Inquiry was seeking information about gambling habits and methods. This requires a different consideration of the factors at play and the risks to people than if witnesses were being examined in order to seek evidence or intelligence about, for example, alleged homicides. While it could be argued that utilising such significant coercive powers is excessive in circumstances where some witnesses may not be alleged criminals, and in attempting to uncover information in order to inform a public policy debate, the use of these powers remains justified by the nature of the serious crime concern being examined and the potential for that crime to fund further serious offending and cause significant damage to the community.

It also meant that some traditional concepts of administrative law, such as procedural fairness, are applied differently. For example, the requirement to provide procedural fairness to a person or organisation against whom an adverse finding might be made in, say, a Special Commission of Inquiry report or an Independent Commission Against Corruption report, where specific findings are made about the conduct of the parties, will not apply in the same way as in an intelligence report which does not contemplate making specific adverse findings against particular parties. The Project Islington report was able to make findings that might be considered to be against the interests of an organisation (such as pubs and clubs), but because the investigation did not set out to make — nor made — adverse findings against any particular entity in the legal sense, there was no obligation to provide procedural fairness in allowing them to respond to the report before findings were made. However, because the report *would* benefit from access to the best evidence available, submissions were invited from the pubs and clubs' peak bodies because of their special insight into the activities under consideration.

The tension between secrecy and parliamentary oversight

In May 2023, an independent New South Wales lower house parliamentarian, the Honourable Alex Greenwich MP, moved to use NSW Legislative Assembly Standing Order 269 to compel the production of papers related to Project Islington.[26] This was a result of an allegation that Liquor & Gaming NSW had not provided the Commission with all the information that it required to make a fully informed assessment about the nature and extent of money laundering via EGMs.

This has created a tension between secrecy provisions in the *CCA* and the transparency expected by the Parliament. While Parliament does and should have the power to compel the production of documents held by the executive branch of government, when the information called for tends to reveal operational matters, covert law enforcement methods, or names of persons of interest or staff who risk harm if their identities are revealed, the tension created is one that relies on a strong understanding of these issues by parliamentarians. It also creates an inherent risk that federal law enforcement agencies may be cautious or limit their engagement with state-based law enforcement agencies, should they perceive a risk of sensitive law enforcement information being disclosed in a State Parliament. At the time of writing, this remains a live issue.

Conclusions and next steps for the Commission

The evolution of the Commission's functions and powers have led it to venture from the traditional model of investigation of serious criminal conduct, to use its powers to investigate more thematic serious crime concerns and make findings and recommendations aimed at reforming policy and legislative settings to disrupt the operating environment for serious crime.

26 New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 May 2023, 1 (Alex Greenwich, Member for Sydney).

The use of criminal intelligence gathering and analysis methods provided a significant evidence base for policy reform recommendations by delving deeper into the issues, and utilised a multi-faceted approach to gathering a breadth of evidence that would not be available to the usual public policy development process. However, this requires an ongoing assessment of the balance between transparency, confidentiality and accountability. While the Commission's methods cannot always be completely transparent, it will strive to balance transparency and confidentiality to produce credible policy proposals while protecting its sources of information and its methodology.

Some more legal implications of pork barrelling — part 1: relevant Commonwealth legislation

*JC Campbell**

Some of the legal implications of pork barrelling were considered in an article I wrote in 2022.[1] This article updates and supplements the 2022 article. It adopts the same explanation of what constitutes pork barrelling, namely "the allocation of public funds and resources to targeted electors for partisan political purposes".[2] The "legal implications" that I considered in the 2022 article included provisions of the administrative law, the civil law and the criminal law that might be breached when there was pork barrelling; the people or bodies who had powers to investigate and deal with pork barrelling; and provisions of a procedural, protective or evidentiary kind that provided assistance in the disclosure, discovery and proof of pork barrelling.

Because the 2022 article was written for the purposes of an inquiry being conducted by the Independent Commission Against Corruption of New South Wales (NSW ICAC) into pork barrelling, it did not deal with implications that arose under the law of the Commonwealth. This article seeks to outline some provisions of the law of the Commonwealth that have a bearing on pork barrelling, as well as some developments in the law of New South Wales relevant to pork barrelling. The article will appear in three instalments (Parts 1, 2 and 3) in issues 109, 110 and 111 of *AIAL Forum*.

In this issue, Part 1 covers the *Public Governance, Performance and Accountability Act 2013* (Cth) and subordinate legislation made under it, and considers the role of a Commonwealth document that is not legislation, namely the newly released Commonwealth Ministerial Code of Conduct. Appendix 1 sets out findings of audits into federal and New South Wales grants programs funded by the Commonwealth Government.

Part 2 continues the focus on the Commonwealth by looking at relevant Commonwealth sanctions and investigatory powers, including the *Ombudsman Act 1976* (Cth), the recently enacted *National Anti-Corruption Commission Act 2022* (Cth), the *Criminal Code Act 1995* (Cth), the *Public Interest Disclosure Act 2013* (Cth), the *Commonwealth Electoral Act 1918* (Cth) and the application of the *Administrative Decisions (Judicial Review) Act 1997* (Cth).[3]

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1 JC Campbell, "Some legal implications of pork barrelling" (2022) 52 *Australian Bar Review* 129 (*ABR*); also published as Professor Joseph Campbell, "Appendix 3: Some legal implications of pork barrelling", Independent Commission Against Corruption (NSW), *Report on Investigation into Pork Barrelling in NSW* (ICAC Report, August 2022) 186.

2 Ibid *ABR* 129; ICAC Report 186; see also Susanna Connolly, "The regulation of pork barrelling in Australia" (2020) 35 *Australasian Parliamentary Review* 24.

3 There is also a *Law Enforcement Integrity Commissioner Act 2006* (Cth). However, it is concerned with the prevention, detection and investigation of corrupt conduct within law enforcement agencies, and that is not a context within which pork barrelling is likely to occur. The Grattan Institute report on preventing pork barrelling issued in August 2022 is concerned with maters of public policy relating to pork barrelling rather than the legal implications of it: see Danielle Wood, Kate Griffiths and Anika Stobart, *New Politics: Preventing Pork-Barrelling* (Report, Grattan Institute, August 2022).

Part 3 focuses on the report that the NSW ICAC issued following its inquiry, some relevant legislation passed in 2023 in New South Wales, and some case law that clarifies principles, in particular for sentencing of the crime of misconduct in public office. This instalment also includes Appendix 2 on the NSW Government Grant Guidelines.

Commonwealth legislation relevant to pork barrelling

When a person engages in pork barrelling using funds or other assets of the Commonwealth Government, it is possible that some of the legal standards that were discussed in the 2022 article will be breached — that there will be the common law crime of misbehaviour in public office, or a conspiracy to commit that common law offence, or that the tort of misbehaviour in public office will be committed, or that there is a breach of a process contract concerning the manner in which grant applications will be assessed. It is also possible that a provision of a state statute could be infringed when there is pork barrelling using funds or other assets of the Commonwealth, unless the particular statutory provision is one that in its terms or by implication does not relate to a Commonwealth official, or there is Commonwealth legislation that covers the field, with the result that the state statute is invalidated in whole or part by s 109 of the *Constitution*. This part of the article examines some Commonwealth legislation that might be applicable when pork barrelling occurs, in addition to the legal standards that arise under the common law or state law.

The *Public Governance, Performance and Accountability Act 2013*

An Act of central importance to the Commonwealth laws that relate to pork barrelling is the *Public Governance, Performance and Accountability Act 2013* (Cth) (*PGPA Act*). It is not possible to state briefly all the ways in which that Act may have an effect concerning pork barrelling; however, a broad but incomplete indication can be given.

Section 5 states the Act's objects, which include:

> (c) to require the Commonwealth and Commonwealth entities:
>
> (i) to meet high standards of governance, performance and accountability; and
>
> (ii) to provide meaningful information to the Parliament and the public; and
>
> (iii) to use and manage public resources properly; and
>
> (iv) to work cooperatively with others to achieve common objectives, where practicable; …

The meaning of "proper" in the PGPA Act

Section 8 confers a special meaning on the word "proper" for the purposes of the *PGPA Act*, namely:

> ***proper***, when used in relation to the use or management of public resources, means efficient, effective, economical and ethical.[4]

4 *Public Governance, Performance and Accountability Act 2013* (Cth) s 8 (*PGPA Act*). While s 8 also contains a definition of "public resources", the term includes all money and other property of the Commonwealth or a corporate Commonwealth entity, and so is no narrower than the ordinary English meaning of the term

That definition gives content to the stated object in s 5(c)(iii) of the Act, "to require the Commonwealth and Commonwealth entities … to use and manage public resources properly".[5] Then, through the requirement that legislation be interpreted to best achieve the purpose or object of the Act,[6] the definition in s 8 can influence interpretation of the whole of the *PGPA Act*. The definition also feeds into numerous of the later specific provisions of the *PGPA Act* that use the word "proper" or one of its grammatical cognates[7] and are relevant to pork barrelling.

For a Commonwealth entity to act in a way that is "proper" in the management of public resources:

- Its action would have to satisfy all four of the requirements of being efficient, effective, economical and ethical.

- In the definition of "proper", the word "ethical" would have its ordinary English meaning.[8] Use of governmental resources to promote the political advantage of a particular party is simply not ethical.

- In the definition the words "efficient" and "effective" would be read down so that they refer to being efficient and effective in achieving proper aims of the Commonwealth Government.[9] Being efficient and effective in promoting the prospects of a particular political party would not count.

- Similarly, "economical" would involve seeking to obtain value for money in achieving legitimate governmental objectives of the Commonwealth Government.

Who is bound by the PGPA Act?

Many of the obligations that are created by the *PGPA Act* arise by reference to whether a person or body is or has a particular role in a "Commonwealth entity". Section 10 lists the types of entity that are a "Commonwealth entity":

> (1) A ***Commonwealth entity*** is:
>
> (a) a Department of State; or
>
> (b) a Parliamentary Department; or

in so far as it applies to assets owned or administered in the Commonwealth realm of government (ie, not exclusively assets owned or administered in the sphere of state or local government).

5 Even though the defined term is "proper", and the provision quoted uses the word "properly", s 18A of the *Acts Interpretation Act 1901* (Cth) states: "In any Act where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings."

6 *Acts Interpretation Act 1901* (Cth) s 15AA.

7 Such provisions include *PGPA Act* (n 4) ss 15, 26, 27, 28, 37, 41, 71, 102. The definition is relevant to grammatical cognates of "proper": *Acts Interpretation Act 1901* (Cth) s 18A, quoted in n 5 above.

8 *The Environment Centre NT Inc v Minister for Resources and Water (Cth) (No 2)* (2021) 399 ALR 68, [70] (Griffiths J) (*Environment Centre NT*).

9 *Acts Interpretation Act 1901* (Cth) s 15A requires an Act to be construed so as not to exceed the legislative power of the Commonwealth.

(c) a listed entity;[10] or

(d) a body corporate that is established by a law of the Commonwealth; or

(e) a body corporate that:

(i) is established under a law of the Commonwealth (other than a Commonwealth company); and

(ii) is prescribed by an Act or the rules to be a Commonwealth entity.

Note: Commonwealth companies are not Commonwealth entities …

(2) However, the High Court and the Future Fund Board of Guardians are not *Commonwealth entities*.

While it will be necessary to check whether a particular person or body has the appropriate relationship to a Commonwealth entity to come under an obligation created by the *PGPA Act*, it can be said that a very wide range of Commonwealth bodies and officials will be subject to the Act.

Duties of accountable authorities concerning pork barrelling

Section 12 of the *PGPA Act* requires each Commonwealth entity to have an "accountable authority", and identifies who is the "accountable authority" of various different Commonwealth entities. Broadly, the "accountable authority" of a Commonwealth entity is the person or group of people in charge of that entity. For a Department of State, it is the Secretary of the Department. For a Parliamentary Department it is the Secretary of the Department.

The *PGPA Act* imposes various duties on an accountable authority. One that is directly relevant to pork barrelling arises under s 15(1):

15 Duty to govern the Commonwealth entity

(1) The accountable authority of a Commonwealth entity must govern the entity in a way that:

(a) promotes the proper use and management of public resources for which the authority is responsible; and

(b) promotes the achievement of the purposes of the entity; and

(c) promotes the financial sustainability of the entity.

…

Section 15(1)(a) would have the defined meaning applied to "proper". Thus, an authority who governed the authority in a way that permitted funds at its disposal to be used for pork barrelling could be in breach of s 15(1)(a). As well, if the accountable authority used funds at its disposal, or permitted such funds to be used, to advance a partisan political purpose, those funds would almost inevitably not be used for promoting the authority's own purposes, and so the authority would be in breach of s 15(1)(b).

10 *PGPA Act* (n 4) s 8 uninformatively defines "listed entity" as meaning: "(a) any body (except a body corporate), person, group of persons or organisation (whether or not part of a Department of State); or (b) any combination of bodies (except bodies corporate), persons, groups of persons or organisations (whether or not part of a Department of State); that is prescribed by an Act or the rules to be a listed entity."

Another duty of the accountable authority arises under s 16 of the *PGPA Act*:

> **16 Duty to establish and maintain systems relating to risk control**
>
> The accountable authority of a Commonwealth entity must establish and maintain:
>
> (a) an appropriate system of risk oversight and management for the entity; and
>
> (b) an appropriate system of internal control for the entity;
>
> including by implementing measures directed at ensuring officials of the entity comply with the finance law. (Section notes omitted)

The term "finance law" is defined in s 8 of the *PGPA Act* as meaning:

> (a) this Act; or
>
> (b) the rules; or
>
> (c) any instrument made under this Act; or
>
> (d) an Appropriation Act.

Thus, without seeking to spell out all the ways in which s 16 might bear upon pork barrelling, to the extent to which pork barrelling involved (in particular) a breach of the *PGPA Act* or of the *Commonwealth Grants Rules and Guidelines 2017* (discussed below),[11] the accountable authority would have a duty under s 16 to implement internal controls and other measures directed at ensuring there were no such breaches.

Duties of an "official of a Commonwealth entity" concerning pork barrelling

Section 13 of the *PGPA Act* defines who is an "official of a Commonwealth entity". One way in which a person can be an official of a Commonwealth entity is if that person is the accountable authority of the entity, or a member of the accountable authority of the entity, or an officer, employee or member of the entity. Thus, almost any senior public servant would count as an "official of a Commonwealth entity".

However, of particular importance, so far as pork barrelling is concerned, is that a Minister is excluded from the definition of "official of a Commonwealth entity".[12] In so far as the *PGPA Act* imposes duties on Ministers, it does so by ss 66, 67 and 71, considered below.

The *PGPA Act* imposes various duties on an official of a Commonwealth entity. They include a duty of care and diligence under s 25, and a duty to "exercise his or her powers, perform his or her functions and discharge his or her duties honestly, in good faith, and for a proper purpose" under s 26. The definition of "proper" mentioned above would apply in deciding the extent of the obligation created by these provisions. There are some situations in which pork barrelling could involve the official breaching one or more of these duties.

11 Department of Finance (Cth), *Commonwealth Grants Rules and Guidelines 2017* (*CGRGs*). This qualifies as part of the "finance law" because it is an instrument made under the *PGPA Act*.

12 *PGPA Act* (n 4) s 13(4). There are also some other exceptions made by s 13(4), but these other excepted people are unlikely to be in a position to make the types of decision that are involved in pork barrelling.

As well, an official of a Commonwealth entity is prohibited under s 27(a) from "improperly us[ing] his or her position … to gain, or seek to gain, a benefit or advantage for himself or herself or for any other person". Using the official's position to gain, or seek to gain, an advantage for a particular candidate, or a particular party[13] — as could happen when there is pork barrelling — could involve a breach of this provision. Again, the special expanded meaning of "proper" that arises under the definition of "proper" in s 8 of the *PGPA Act* would apply to the obligation under s 27 not to use the official's position improperly.

Interaction of the PGPA Act with the Commonwealth Public Service Act 1999 and Parliamentary Service Act 1999

The *Public Service Act 1999* (Cth) establishes in s 13 an APS Code of Conduct, which sets out certain obligations that apply to employees in the Australian Public Service (APS).[14] Those obligations relevant to pork barrelling include:

> **13 The APS Code of Conduct**
>
> …
>
> (4) An APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws. For this purpose, ***Australian law*** means:
>
> (a) any Act (including this Act), or any instrument made under an Act; or
>
> (b) any law of a State or Territory,[15] including any instrument made under such a law.
>
> …
>
> (8) An APS employee must use Commonwealth resources in a proper manner and for a proper purpose.
>
> …
>
> (10) An APS employee must not improperly use inside information or the employee's duties, status, power or authority:
>
> (a) to gain, or seek to gain, a benefit or an advantage for the employee or any other person …
>
> …

13 The conventional view is that each of the major Australian political parties is an unincorporated association, and thus nothing more than a collection of individual members. But as a matter of statutory interpretation the singular of a word includes the plural (*Acts Interpretation Act 1901* (Cth) s 23(b)), so seeking to gain an advantage for the collection of people who make up the party could breach this provision. There is an alternative view, that legislation confers significant rights and obligations on parties, with the effect that the parties are incorporated by implication by that legislation. If a party is incorporated by implication, then the party itself is a "person".

14 These obligations also apply to agency heads and statutory office holders: *Public Service Act 1999* (Cth) s 14.

15 Statutes and regulations of a state or territory are clearly included in this expression. It is open to debate whether the common law applicable in a state or territory is also included. Though *Mok v Director of Public Prosecutions (NSW)* (2016) 257 CLR 402 held that "law of a State" can include both the common law in force in the State as well as the statute-based law, that decision was influenced by there being a provision stating that a reference to a law of a state was a reference to the law in force in that state. *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 held that the expression "law of a State" in s 109 of the *Constitution* includes statutes, regulations and industrial awards, or other instruments made under a statute, but the question at issue in that case was whether a State award was a "law of the State" for the purposes of s 109. The answer to the question would need to take into account that there is only one common law in Australia, which derives its unity through the role of the High Court under s 73 of the *Constitution*: *Lipohar v The Queen* (1999) 200 CLR 485, 505–8.

Being involved in pork barrelling could involve a breach of each of these obligations. The obligation in s 13(4) could be breached by pork barrelling that infringed any of the state statutes identified in my 2022 article,[16] or that infringed any of the Commonwealth statutes or subordinate legislation mentioned in the present article.

There is no special definition of "proper" in the *Public Service Act*, so the obligation in s 13(8) to use Commonwealth resources "in a proper manner and for a proper purpose" would be construed in accordance with the ordinary meaning of those words. However, that ordinary meaning would be influenced by the context in which the *Public Service Act* operates, namely, that very many APS employees would also be officials of a Commonwealth entity within the meaning of the *PGPA Act*, and so subject to obligations under ss 25–27 of the *PGPA Act* whose content was influenced by the special definition of "proper". When one bears in mind the desirability of achieving coherence within the law, and in particular coherence within a group of interrelated statutes that together govern the one subject matter, it is not likely that any narrower meaning of "proper" would be adopted in s 13(8) than applies under the *PGPA Act*. Thus, using resources to benefit a political party is likely to infringe s 13(8). Similarly, pork barrelling could involve an APS employee in improperly using their duties or authority to gain a benefit for someone other than the employee, and so infringe s 13(10).

Under s 15 of the *Public Service Act*, if an APS employee breaches any of the obligations in the APS Code of Conduct, the agency head can impose sanctions, including:

(a) termination of employment;

(b) reduction in classification;

(c) re-assignment of duties;

(d) reduction in salary;

(e) deductions from salary, by way of fine;

(f) a reprimand.[17]

However, that is not an exhaustive statement of the sanctions that can be imposed on an APS employee who is involved in pork barrelling. As well, depending on the role that the employee played in the pork barrelling, they could have a liability to repay the amount inappropriately given away or the loss sustained by the Commonwealth as a consequence of the pork barrelling. This liability could arise under s 69 or s 70 of the *PGPA Act*, considered below.

The *Parliamentary Service Act 1999* (Cth) governs the conditions of employment of various people who provide services to support and advise the Houses of Parliament, parliamentary committees and Members of Parliament. It mirrors in many respects the *Public Service Act*, including in having in s 13 a Parliamentary Service Code of Conduct that imposes on an employee of the Parliamentary Service obligations almost identical to those arising under s 13 of the *Public Service Act* quoted above. The Parliamentary Service Code of Conduct applies not only to employees, but also to Secretaries of a Department, and to

16 Campbell (n 1).
17 *Public Service Act 1999* (Cth) s 15(1).

certain statutory office holders.[18] Section 15 of the *Parliamentary Service Act* also allows the same sanctions for breach of an obligation under its Code of Conduct as does the *Public Service Act*.[19]

Section 32 of the *PGPA Act* says:

> **32 Officials to whom the Public Service Act or Parliamentary Service Act applies**
>
> To avoid doubt, the finance law is an Australian law for the purposes of subsection 13(4) of the *Public Service Act 1999* and subsection 13(4) of the *Parliamentary Service Act 1999*.
>
> (Section notes omitted)

While it would be necessary to check concerning any particular alleged act of pork barrelling, in many cases it is likely that the people responsible for making the decisions would be drawn from the relevant Minister, and people who fell under one or other of the Codes of Conduct. Because the *PGPA Act* is part of the finance law, if a person to whom one of the Codes of Conduct applies were to engage in the type of pork barrelling that breached the *PGPA Act*, that person could be open to any of the sanctions arising under s 15 of the *Public Service Act* or s 15 of the *Parliamentary Service Act*.

Section 30 of the *PGPA Act* is another provision that allows the termination of the appointment of a person to a position in a corporate Commonwealth authority if that person has breached any of the obligations under ss 25–29 of the *PGPA Act*.

Obligations of a Minister under the PGPA Act

Section 71 of the *PGPA Ac*t provides:

> **71 Approval of proposed expenditure by a Minister**
>
> (1) A Minister must not approve a proposed expenditure of relevant money unless the Minister is satisfied, after making reasonable inquiries, that the expenditure would be a proper use of relevant money.
>
> (2) If a Minister approves a proposed expenditure of relevant money, the Minister must:
>
> (a) record the terms of the approval in writing as soon as practicable after giving the approval; and
>
> (b) comply with any other requirements prescribed by the rules in relation to approvals of proposed expenditure.
>
> …

The "rules" referred to in s 71(2)(b) are defined by s 8 to mean rules made under s 101.[20]

The Environment Centre NT Inc v Minister for Resources and Water (Cth) (No 2)[21] considered the nature of the obligation of a Minister under s 71 of the *PGPA Act* to make reasonable

18 *Parliamentary Service Act 1999* (Cth) s 14.
19 Ibid s 15(1).
20 *PGPA Act* (n 4) s 101 provides, broadly, that such rules are ones made by the Finance Minister by legislative instrument for the purpose of carrying out the *PGPA Act*. Such rules have been made, and are considered on pages 116–17 below.
21 *Environment Centre NT* (n 8).

enquiries before approving an expenditure of money. An applicant for review of a Minister's decision argued that if the court decided the Minister had not made reasonable enquiries, then an essential precondition ("an objective jurisdictional precondition") to the Minister approving the expenditure of money had not been met, and thus the Minister's decision was invalid. Justice Griffiths rejected that argument.[22] However, his Honour accepted that s 71

> turns on the Minister's opinion or judgement (which is, in turn, subject to judicial review but not on the basis of the matter being objective). In other words, the opinion or judgement will need to be reasonably and rationally formed and be based on probative material (see, for example, *SHJB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 134 FCR 43; [2003] FCAFC 303 at [22] per Carr, Finn and Sundberg JJ).[23]

Personal liability for unauthorised gifts and payments — application to pork barrelling

Section 66 of the *PGPA Act* states:

> **66 Gifts of relevant property**
>
> (1) A Minister or an official of a non-corporate Commonwealth entity must not make a gift of relevant property unless:
>
> (a) the property was acquired or produced to use as a gift; or
>
> (b) the making of the gift:
>
> (i) is expressly authorised by law; or
>
> (ii) is authorised by the Finance Minister in writing; or
>
> (iii) is made in accordance with any requirements prescribed by the rules.
>
> (2) An authorisation under subparagraph (1)(b)(ii) is not a legislative instrument.

Section 67 states:

> **67 Liability for unauthorised gifts of relevant property**
>
> (1) A Minister or an official of a non-corporate Commonwealth entity is liable to pay an amount to the Commonwealth if the Minister or official makes a gift of relevant property in contravention of section 66.
>
> (2) The amount the Minister or official is liable to pay under subsection (1) is the value of the relevant property.

There is no definition of "gift" in the *PGPA Act*, so the ordinary English meaning of the word would apply. Section 8 of the Act defines "relevant property" in a very broad fashion, but in a way that does not include "relevant money".[24] Thus, the prohibition in s 66, and the liability in s 67, would often not apply when there is pork barrelling, because pork barrelling is usually

22 Ibid [47]–[80].
23 Ibid [61].
24 The definition is: "***relevant property*** means: (a) property (other than relevant money) that is owned or held by the Commonwealth or a corporate Commonwealth entity; or (b) any other thing prescribed by the rules."

achieved by the payment of money.[25] The term "relevant money" is also defined very widely in s 8 as meaning:

> (a) money standing to the credit of any bank account of the Commonwealth or a corporate Commonwealth entity; or
>
> (b) money that is held by the Commonwealth or a corporate Commonwealth entity.

Section 68 creates a liability on a Minister or an official for very limited types of loss of relevant property or relevant money:

> **68 Liability for loss — custody**
>
> (1) A Minister or an official of a non-corporate Commonwealth entity is liable to pay an amount to the Commonwealth if all of the following apply:
>
> (a) a loss of relevant money or relevant property occurs (including by way of deficiency, destruction or damage);
>
> (b) at the time of the loss, the Minister or official had custody of the money or property as described in subsection (3) or (4);
>
> (c) the Minister or official did not take reasonable steps in the circumstances to prevent the loss.
>
> (2) The amount the Minister or official is liable to pay under subsection (1) is:
>
> (a) for a loss of relevant money — the amount of the loss; or
>
> (b) for a loss of relevant property:
>
> (i) if the property is damaged — the value of the property or the cost of repairing the property, whichever is less; or
>
> (ii) otherwise — the value of the property.
>
> …

The requirement that the Minister or official have custody of the money or property, before s 68 applies, will mean that s 68 will seldom apply to pork barrelling. This is because s 68 adopts a very narrow notion of "custody":

> (3) For the purposes of paragraph (1)(b), a person has custody of relevant money if the person:
>
> (a) holds the money by way of a petty cash advance, change float or other advance; or
>
> (b) has received the money, but has not yet dealt with it as required by section 55 (which is about banking of relevant money).
>
> (4) For the purposes of paragraph (1)(b), a person has custody of relevant property if:
>
> (a) the person has taken delivery of the property and has not returned it to another person entitled to receive the property on behalf of the Commonwealth; and
>
> (b) when the person took delivery of the property the person signed a written acknowledgement that the property was delivered on the express condition that the person would at all times take strict care of the property.

25 This is not always the case — in *Porter v Magill* [2002] 2 AC 357 it occurred through the sale of council assets at an undervalue to achieve an advantage for a particular political party. See discussion in Campbell (n 1) ICAC Report 214–19.

A Minister or official will often have power to dispose of money or property, without having actual custody of it. A more likely source of a personal obligation to make good loss of Commonwealth funds or property given away in pork barrelling is ss 69 and 70 of the *PGPA Act*:

> **69 Liability for loss — misconduct**
>
> (1) A Minister or an official of a non-corporate Commonwealth entity is liable to pay an amount to the Commonwealth if:
>
> (a) a loss of relevant money or relevant property occurs (including by way of deficiency, destruction or damage); and
>
> (b) the Minister or official caused or contributed to the loss by misconduct, or by a deliberate or serious disregard of reasonable standards of care.
>
> (2) The amount the Minister or official is liable to pay under subsection (1) is so much of the loss as is just and equitable having regard to the Minister's or official's share of the responsibility for the loss.
>
> **70 Provisions relation to liability of Ministers and officials**
>
> (1) An amount payable to the Commonwealth under subsection 67(1), 68(1) or 69(1) is recoverable as a debt in a court of competent jurisdiction.
>
> (2) The Commonwealth is not entitled to recover amounts from the same person under subsection 68(1) or 69(1) for the same loss.
>
> (3) A person's liability under subsection 67(1), 68(1) or 69(1) is not avoided merely because the person has ceased to be a Minister or an official.[26]

The word "misconduct" is not given a special definition, so it would have its ordinary English meaning, but informed by the context in which it occurs in the *PGPA Act*. That is, it would include failing to act in any of the ways in which the *PGPA Act* provides that the Minister or official in question must act — and there are many provisions in the *PGPA Act* that provide that a person performing a particular governmental role must act in a particular way, with an italicised "must". Misconduct would also, as part of its ordinary English meaning, include any action that constituted a crime, or possibly a tort, under a provision of the law (whether federal or state) other than the *PGPA Act*.[27] Conduct that was contrary to the Code of Conduct for Ministers could also count as misconduct for the purposes of s 69(1)(b). This is because that Code is one that has been publicly announced as containing standards of conduct to which Ministers are expected to adhere.[28] Conduct that did not comply with the *Commonwealth Grants Rules and Guidelines 2017* could also count as "misconduct" (see below).

26 This provision is closely analogous to s 9.15 of the *Government Sector Finance Act 2018* (NSW), considered in my 2022 article in section 5.3: see Campbell (n 1) ICAC Report 270–1.

27 Ways in which pork barrelling could be a crime, or a tort, under the general law or the law of New South Wales are explored in Campbell (n 1).

28 See the discussion of the Code on pages 118–19 below. In my view it is legitimate to take the Code into account in construing the word "misconduct" in the *PGPA Act*, even though the Code was promulgated after the *PGPA Act* was enacted. That is because the Act would be construed as "always speaking", not as having the denotation of words in it frozen at the date of its promulgation: *Preston v Commissioner for Fair Trading* [2011] NSWCA 359, [34] and cases there cited; *MZXOT v Minister for Immigration and Citizenshi*p (2008) 233 CLR 601, [22]; *Minister for the Army v Parbury Henty & Co* (1945) 70 CLR 459, 505; *Hore v Albury Radio Taxis Co-operative Society Ltd* (2002) 54 NSWLR 210, [40]–[43] and Appendix; *Forsyth v DCT* (2007) 231 CLR 531, [3].

There are very many tasks that are said to be ones that a Minister or official "must" do in connection with expenditure of Commonwealth money, and that failure to do would count as misconduct. Those tasks are of many different types, covering the giving of advice, the making of written records, and all stages in the process of deciding how to spend the money in question. A failure to do any of them will count as misconduct. However, in the application of s 69 of the *PGPA Act* in any particular case, there could be a real question of causation — whether the particular act of misconduct has "caused or contributed to the loss of relevant money or relevant property". Whether the element of causation is made out will depend on the facts of the individual case. At the level of generality at which this article is written, it is not possible to say anything other than to draw attention to the possibility of a causation of loss issue arising.

In the application of ss 69 and 70 to a decision of a Minister concerning expenditure of public money, if an applicant can persuade a court that the Minister approved an expenditure of relevant money but had not considered at all the question of whether the proposed use of the money in question would be a proper use of that money (in the defined sense of "proper"), or had not actually concluded that the expenditure would be a proper use of the relevant money (also in the defined sense of "proper"), that would be a sufficient reason for the Minister's decision being invalid. It would also mean that the Minister was guilty of "misconduct" (because of the words "A Minister must not approve unless …" in s 71), and so had a potential liability to repay the money, under s 69. Further, it follows from Griffith J's decision in *The Environment Centre NT* that if any opinion that the Minister formed that the proposed use would be a proper one was not reasonably and rationally formed on the basis of probative materials, then the Minister's decision would be invalid. However, being invalid is not enough for the making of the decision to count as "misconduct" — a departure from the duties that the Minister had (whether arising under a statute or statutory instrument, under tort law, under criminal law or under the Ministerial Code of Conduct), or conduct that an ordinary person would regard as departing from how a Minister should act, would be needed.

It is possible that a Minister or official liable under s 69 of the *PGPA Act* is also liable for damages for the tort of misbehaviour in public office. Each of these liabilities could be enforceable against the Minister or official, and there is no reason why having one of the liabilities is a reason for lessening the amount payable concerning the other liability. The damages for the tort are payable to the person who has suffered damage as a result of the commission of the tort, while the liability under s 69 is a liability to pay an amount to the Commonwealth.

The *Commonwealth Grants Rules and Guidelines 2017*

Commonwealth Grants Rules and Guidelines 2017 (*CGRGs*) are issued by the Minister for Finance under s 105C of the *PGPA Act*. Section 105C provides that such a document is a legislative instrument, but not one that is subject to disallowance pursuant to s 42 of the *Legislation Act 2003* (Cth). Thus, the *CGRGs* state "rules" within the meaning of s 71(2)(b) of the *PGPA Act*, and so set out matters that a Minister must comply with in approving proposed expenditure of relevant money.

Clause 2.1 of the *CGRGs* states:

> The objective of grants administration is to promote proper[5] use and management of public resources through collaboration with government and non-government stakeholders to achieve government policy outcomes.
>
> [5] Proper is defined in the PGPA Act. See section 8, Dictionary.

Thus the definition of "proper" in the *PGPA Act* applies to its use in the *CGRGs*.

The *CGRGs* are set out in two interrelated parts, with Part 1 (cll 1–5) entitled "Mandatory Requirements" and Part 2 (cll 6–13) entitled "Guidance on Key Principles". Despite these headings, not all of the requirements that are mandatory are found in Part 1. Clause 1.5 says:

> Requirements that must be complied with are denoted by the use of the term *must* in the CGRGs. The use of the term "should" in the CGRGs, denotes better practice.

And cll 6.2 and 6.3 state (footnotes omitted):

> 6.2. The seven key principles for grants administration that apply to the grants lifecycle and all grant opportunities are:
>
> - robust planning and design;
> - collaboration and partnership;
> - proportionality;
> - an outcomes orientation;
> - achieving value with relevant money;
> - governance and accountability; and
> - probity and transparency.
>
> 6.3. Accountable authorities and officials *must* put in place practices and procedures to ensure that grants administration is conducted in a manner that is consistent with these seven key principles. Ensuring that the requirements of the CGRGs are well understood and effectively incorporated into the administration of grant opportunities is important, to ensure that potential grantees best suited to undertake grant activities apply for and receive a grant.

Because of the italicised "must" in cl 6.3, adoption of practice and procedures to ensure that grants administration takes place in accordance with the seven principles is a mandatory requirement.

Clause 2 contains some provisions that seek to make more clear what types of provision of financial assistance by or on behalf of the Commonwealth count as a "grant":

> 2.8 Grants administration encompasses all processes involved in the grants lifecycle, including:
>
> a. design of grant opportunities and activities;
>
> b. assessment and selection of grantees;
>
> c. establishment of grants;

d. ongoing management of grantees and grant activities; and

e. evaluation of grant opportunities and activities.

2.9 The CGRGs apply to grants administration performed by:

a. Ministers;

b. accountable authorities;

c. officials; and

d. third parties who undertake grants administration on behalf of the Commonwealth. (footnote omitted)

The identity of the officials whose titles appear in cl 2.9 is discoverable from other legislation. A "Minister" includes a Parliamentary Secretary[29] and an acting Minister.[30] Definitions of "accountable authorities" and "officials" appear in the *PGPA Act*, and those definitions are also applicable in the *CGRGs* because it is an instrument made under the *PGPA Act*.[31]

The provisions of, in particular, Part 1 of the *CGRGs* set out an admirable set of standards for the expenditure of Commonwealth funds through grants. If they were actually followed, the *CGRGs* would eliminate completely or nearly so the possibility of pork barrelling occurring in the making of grants. However, experience has shown that grant administration does not always proceed in accordance with the *CGRGs*. Two examples of recent reports by the Australian National Audit Office that have so found are given in Appendix 1 to this article.

The *CGRGs* are lengthy, but so important that it is worthwhile to quote just some of the detail of their provisions:[32]

Entity guidance

2.10 Officials *must* comply with the CGRGs. There is a range of supporting documentation to assist entities to implement the CGRGs, including:

a. finance guidance, which provide more detailed better practice information on how to apply the resource management framework, including the grants policy framework;

b. whole-of-government tools and templates issued by Finance to assist entities to implement the grants policy framework; and

c. overarching whole-of-government documents that are relevant to grants administration.

Resource Management Framework

3.1 Ministers, accountable authorities and officials operate within an environment of legislation and government policy. Within this broad context, the resource management framework consists of the legislation, policy and guidance governing the management of public resources.

29 *Ministers of State Act 1952* (Cth).

30 *Acts Interpretation Act 1901* (Cth) s 19(4).

31 *Legislation Act 2003* (Cth) s 13(1)(b) provides: "If enabling legislation confers on a person the power to make a legislative instrument or notifiable instrument, then, unless the contrary intention appears: … expressions used in any instrument so made have the same meaning as in the enabling legislation as in force from time to time …".

32 *CGRGs* (n 11) cll 2.10–5.2 (footnotes omitted).

3.2 The resource management framework contains an overarching requirement that accountable authorities *must* govern entities in a way that promotes proper use and management of public resources. In managing the affairs of the entity, accountable authorities *must* comply with the *Constitution*, the PGPA Act, the PGPA Rule [*Public Governance Performance and Accountability Rule 2014* (Cth)] and any other relevant law. In addition, accountable authorities of non-corporate Commonwealth entities *must* govern the entity in a way that is not inconsistent with the policies of the Australian Government.

3.3 Ministers *must* also comply with the relevant legislative requirements in the PGPA Act and Rule and the CGRGs. Officials *must* advise their Ministers on these requirements.

Key resource management legislative requirements

3.4 The PGPA Act and Rule provides the overarching accountability framework for grants administration. Accountable authorities and officials *must* consider their obligations under the PGPA Act and Rule when undertaking grants administration. Internal guidelines, operational guidance and grant opportunity guidelines *must* be consistent with these requirements, while including any additional specific processes.

…

3.6 Before entering into an arrangement for the proposed commitment of relevant money there *must* be legal authority to support the arrangement.

…

Requirements for Accountable Authorities and Officials

…

4.4 Officials *must*:

a. develop grant opportunity guidelines for all new grant opportunities, and revised guidelines where significant changes have been made to a grant opportunity;

b. have regard to the seven key principles for grants administration;

c. ensure that grant opportunity guidelines and related internal guidance are consistent with the CGRGs; and

d. advise the relevant Minister on the relevant requirements of the PGPA Act and Rule and the CGRGs, where a Minister is considering a proposed expenditure of relevant money for a grant.

4.5 Where an accountable authority or an official approves the proposed commitment of relevant money in relation to a grant, the accountable authority or official who approves it *must* record, in writing, the basis for the approval relative to the grant opportunity guidelines and the key principle of achieving value with relevant money.

4.6 Officials *must* provide written advice to Ministers, where Ministers exercise the role of an approver. This advice *must*, at a minimum:

a. explicitly state that the spending proposal being considered for approval is a “grant”;

b. provide information on the applicable requirements of the PGPA Act and Rule and the CGRGs (particularly any ministerial reporting obligations), including the legal authority for the grant;

c. outline the application and selection process followed, including the selection criteria, that were used to select potential grantees; and

d. include the merits of the proposed grant or grants relative to the grant opportunity guidelines and the key principle of achieving value with relevant money.

4.7 While officials do not have to rank all grants when briefing ministers on the merits of a specific grant or group of grants, officials should, at a minimum, indicate:

a. which grant applications fully meet the selection criteria;

b. which applications partially meet the selection criteria; and

c. which applications do not meet any of the selection criteria.

…

Web-based reporting requirements

5.2. Grant opportunity guidelines *must* be made publicly available on GrantConnect[33] except where there is a specific policy reason to not publicise the grant opportunity guidelines or grants are provided on a one-off or ad hoc basis.

Because cl 2.10 requires that officials and Ministers must comply with the *CGRGs*, failure to do so will be misconduct for the purposes of the *PGPA Act*. As noted above, the use of "proper" in cl 3.2 of the *CGRGs* will attract the explanation of the meaning of that word given in the *PGPA Act*. The obligation on officials to give advice to their Minister, found in cll 3.3, 4.4(d) and 4.6 of the *CGRGs*, aims to ensure that Ministers do not proceed in ignorance of the legal constraints on them concerning the expenditure of Commonwealth money. These provisions create a positive obligation on an official to speak up, rather than simply concurring with what a Minister wants. Where the advice is required to be in writing (*CGRGs* cl 4.6), it will provide a valuable aid to proving what was the real purpose in making a particular expenditure of money — the core question in deciding whether a particular payment is pork barrelling. The requirements for having grant opportunity guidelines in cl 4.4, and for recording in writing how a proposed expenditure gives effect to the grant guidelines, will also provide valuable evidence on this topic.

The *Public Governance Performance and Accountability Rule 2014* (Cth)

There is a *Public Governance Performance and Accountability Rule 2014* (Cth) (*PGPA Rule*) made under the *PGPA Act*. Rule 11 (Recovery of debts) of the *PGPA Rule* states:

> The accountable authority of a non-corporate Commonwealth entity must pursue recovery of each debt for which the accountable authority is responsible unless:
>
> (a) the accountable authority considers that it is not economical to pursue recovery of the debt; or
>
> (b) the accountable authority is satisfied that the debt is not legally recoverable; or
>
> (c) the debt has been written off as authorised by an Act.

Apart from the fairly limited let-outs in paragraphs (a) (b) and (c), this rule requires the relevant accountable authority to seek to recover any debt that was due to the Commonwealth as a result of money having been expended on pork barrelling when a debt had fallen due under s 69 or s 70 of the *PGPA Act*. A Minister or official who was sued for such a debt might be found to owe a very large sum of money, similar to the council leader in *Porter v Magill*.[34]

33 GrantConnect is a website that publicises forecast and current Australian government grant opportunities and grants awarded. It is accessible at <https://help.grants.gov.au/>.

34 [2002] 2 AC 357. The liability of the council leader was considered in my 2022 article: see Campbell (n 1) ICAC Report 214–19.

The obligation of the accountable authority to pursue recovery of the debt owed by a Minister or official who has caused Commonwealth money or other assets to be lost through pork barrelling is additional to the possibility of the person who engaged in the pork barrelling being held liable for a criminal offence or (for a public servant) subjected to any of the sanctions available under s 15 of the *Public Service Act* or s 15 of the *Parliamentary Service Act*.

The debt that was due to the Commonwealth as a result of money having been expended through pork barrelling would itself be "relevant property" — it is a chose in action, which is a form of property. If the accountable authority failed to seek to enforce that debt, and it ultimately became statute-barred, the accountable authority could be guilty of loss of the relevant property by misconduct or by deliberate or serious disregard of reasonable standards of care. That could result in the accountable authority having a liability, under s 69 of the *PGPA Act*, to pay to the Commonwealth the value of the property that had become lost.

Rule 18 (Approving commitments of relevant money) of the *PGPA Rule* provides:

> (1) If:
>
> (a) the accountable authority of a Commonwealth entity is approving the commitment of relevant money for which the accountable authority is responsible; or
>
> (b) an official of a Commonwealth entity is approving the commitment of relevant money for which the accountable authority of a Commonwealth entity is responsible;
>
> then the accountable authority or official must record the approval in writing as soon as practicable after giving it.
>
> Note: The accountable authority referred to in paragraph (b) may be the accountable authority of the same Commonwealth entity as the official or it may be the accountable authority of a different Commonwealth entity.
>
> (2) To avoid doubt, the official must approve the commitment, and record the approval, consistently with any written requirements (including any requirements relating to the proper use of that money and spending limits) specified by the accountable authority referred to in paragraph (1)(b) in:
>
> (a) if the official is acting under a delegation or authorisation of the accountable authority:
>
> (i) the instrument that delegates to the official, or otherwise authorises the official to exercise, the accountable authority's power to approve the commitment of relevant money; or
>
> (ii) a direction to the official in relation to the exercise of that power; or
>
> (b) instructions given by the accountable authority.

This rule has the important function of requiring there to be a record made and kept of decisions to expend money, so that later it is possible to know exactly what decisions have been made and why. In carrying out the duty to record the approval, the Commonwealth official would be obliged to carry out the general duties of such an employee of care and diligence, and exercising powers and functions honestly, in good faith and for a proper purpose.[35]

35 *PGPA Act* (n 4) ss 25, 26. See discussion above at page 105.

Commonwealth Ministerial Code of Conduct

There is a *Code of Conduct for Ministers* of the Commonwealth Government, dated June 2022.[36] Some of the provisions of the Code that have a potential relevance to pork barrelling are:[37]

> **1. Key Principles**
>
> 1.1. The ethical standards required of Ministers in Australia's system of government reflect the fact that, as holders of public office, Ministers are entrusted with considerable privilege and wide discretionary power.
>
> 1.2. In recognition that public office is a public trust, the people of Australia are entitled to expect that, as a matter of principle, Ministers will act with due regard for integrity, fairness, accountability, responsibility, and the public interest, as required by this Code.
>
> 1.3. In particular, in carrying out their duties:
>
> (i) Ministers must ensure that they act with i**ntegrity** — that is, through the lawful and disinterested exercise of the statutory and other powers available to their office, appropriate use of the resources available to their office for public purposes, in a manner which is appropriate to the responsibilities of the Minister.
>
> (ii) Ministers must observe **fairness** in making official decisions — that is, to act honestly and reasonably, with consultation as appropriate to the matter at issue, taking proper account of the merits of the matter, and giving due consideration to the rights and interests of the persons involved, and the interests of Australia.
>
> (iii) Ministers must accept they are **accountable** for the exercise of the powers and functions of their office — that is, to ensure that their conduct, representations and decisions as Ministers, and the conduct, representations and decisions of those who act as their delegates or on their behalf — are open to public scrutiny and explanation.
>
> (iv) …
>
> (v) When taking decisions in, or in connection with, their official capacity, Ministers must act in the **public interest** — that is, based on their best judgment of what will advance the common good of the people of Australia.
>
> …
>
> **2. Public Interest and Fairness**
>
> 2.1. Ministers are expected to conduct all official business on the basis that they may be expected to demonstrate publicly that their actions and decisions in conducting public business were taken with the sole objective of advancing the public interest.
>
> 2.2. Ministers must be able to demonstrate that they have taken all reasonable steps to observe relevant standards of procedural fairness and good decision making applicable to decisions made by them in their official capacity.
>
> 2.3. In particular, Ministers are required to ensure that official decisions made by them as Ministers are unaffected by bias or irrelevant consideration, such as considerations of private advantage or disadvantage.
>
> …

36 Australian Government, *Code of Conduct for Ministers* (June 2022). It is accessible at <https://www.pmc.gov.au/resources/code-conduct-ministers>.

37 Ibid (emphasis in original).

3. Conflicts of Interest

…

Gifts

…

3.21. Ministers must not seek or accept any kind of benefit or other valuable consideration either for themselves or for others in connection with performing or not performing any element of their official duties as a Minister.

…

4. Responsibility

…

4.2. Ministers must not encourage or induce other public officials, including public servants, by their decisions, directions or conduct in office to breach the law, or to fail to comply with the relevant code of ethical conduct applicable to them in their official capacity.

4.3. Ministers are also expected to ensure that reasonable measures are put in place in the areas of their responsibility to discourage or prevent corrupt conduct by officials.

5. Accountability

…

5.2. Ministers must ensure that their staff are aware of and comply with the Ministerial Staff Code of Conduct.

…

9. Implementation

…

9.2. Ministers will be required to stand aside if charged with any criminal offence, or if the Prime Minister regards their conduct as constituting a prima facie breach of this Code.

9.3. Ministers will be required to resign if convicted of a criminal offence excepting minor offences at the discretion of the Prime Minister, and may be required to resign if the Prime Minister is satisfied that they have breached or failed to comply with this Code in a substantive and material manner.

9.4. Where an allegation involving improper conduct of a significant kind, including a breach of this Code, is made against a Minister (including the Prime Minister) the Prime Minister may refer the matter to an appropriate independent authority for investigation and/or advice.

…

This Code was not made under the authority of any legislation, and has not been adopted by or referred to in any legislation. It was issued with a Foreword by the Prime Minister, which includes the following statements:

> The people of Australia are entitled to expect that, in the discharge of our duties, we will act in a manner that is consistent with the highest ethical standards.
>
> …
>
> As Prime Minister, I expect my Ministers to demonstrate that they are complying with these high standards of conduct, and in doing so, living up to the expectations of the Australian public.[38]

38 Ibid 3.

The House of Representatives was informed on 22 May 2023, in a Ministerial response to a petition previously presented, that this Code

> sets out expectations for the conduct and behaviour of Ministers. The Code is underpinned by key principles that Ministers must act with due regard for integrity, fairness, accountability, responsibility and the public interest. Ministers are expected to demonstrate they are complying with the high standards of conduct and, in doing so, living up to the expectations of the Australian public.[39]

As mentioned above, this Code of Conduct can be taken into account in deciding whether a Minister has engaged in "misconduct" within the meaning of the *PGPA Act*.

Appendix 1 — Grant administration found to be inadequate by auditors-general

Community Health and Hospitals Program — a Commonwealth program

The Community Health and Hospitals Program (CHHP) was a Federal Government program administered by the *Department of Health and Aged Care* that was announced in 2018. The Australian National Audit Office (ANAO) reviewed the operation of the CHHP, and published a performance audit report on it on 5 June 2023.[40] The CHHP and associated programs comprised 171 projects, including 108 grants and 63 national partnership agreement projects with state or territory governments. The ANAO found that the Department did not develop grant guidelines for 7 of the 108 grants, and ANAO claimed at least three of those were a "deliberate decision by senior management to not comply with finance law".[41]

It was not part of the task that the ANAO set itself in conducting the audit to enquire whether there was pork barrelling in the allocation of grants under the program, but the ANAO's investigation of the program of administration revealed deficiencies of a type that, in any grants program, could be conducive to pork barrelling. Amongst its conclusions and findings[42] were the following:

> 9. The Department of Health and Aged Care's administration of the Community Health and Hospitals Program was ineffective and fell short of ethical requirements.
>
> 10. The Department of Health and Aged Care's (Health's) effective administration of the funding arrangements under the Community Health and Hospitals Program (CHHP) was undermined by deliberate breaches of the Commonwealth Grants Rules and Guidelines and failure to advise government where there was no legislative authority for grant expenditure ... Executive oversight, risk and fraud management were deficient. Health did not seek to advise the government whether national partnership agreement project selection was aligned to CHHP objectives. Health established national partnership agreements that did not create a strong basis for robust project monitoring and milestone payment approvals. Projects funded under grant agreements with Primary Health Networks and non-government organisations were designed, assessed, established and managed in a manner that was largely inconsistent with the Commonwealth Grants Rules and Guidelines.

39 Katy Gallagher, Minister for the Public Service, Ministerial response to petitions, in Commonwealth, *Parliamentary Debates*, House of Representatives, 22 May 2023, 3189 (Susan Templeman).

40 Auditor-General (Cth), *Administration of the Community Health and Hospitals Program — Department of Health and Aged Care* (Auditor-General Report No 31 2022–23, Australian National Audit Office, 5 June 2023) (ANAO Report No 31). For a summary of the report, see "Administration of the Community Health and Hospitals Program", *Australian National Audit Office* (Web Page, 5 June 2023) <https://www.anao.gov.au/work/performance-audit/administration-of-the-community-health-and-hospitals-program>.

41 ANAO Report No 31 (n 40) 9 [14].

42 Ibid 8–9 [9]–[17].

…

14. Health's administration of CHHP grants was not appropriate, involving deliberate breaches of the relevant legal requirements and the principles underpinning them. The classification of the majority of CHHP grants as ad hoc/one-off or non-competitive grants was not appropriately justified. Health did not develop grant opportunity guidelines for seven of 108 CHHP grants, and in at least three instances this represented a deliberate decision by senior management to not comply with finance law. Controls for, and reporting of, non-compliance with finance law were insufficient. Grant opportunity guidelines were produced for other grants. These were not fully consistent with the Commonwealth Grant Rules and Guidelines principles of robust planning, transparency and probity. Health did not appropriately assess risk. Health recommended funding multiple grants prior to confirming that there was lawful authority for grants, or despite knowing that there was no legislative authority. Recommendations to government to fund grants were based on assessment processes that were not fully consistent with the requirements of established grant opportunity guidelines and the Commonwealth Grants Rules and Guidelines. Application processes were not fully consistent with the principle of achieving value for money and Health undertook limited due diligence before recommending funding. Health did not meet obligations to publish grant awards on GrantConnect in a timely and accurate manner. …[43]

The "key messages for all Australian government entities" identified in the ANAO report were:

Grants

- Where decisions of government identify preferred recipients for grants funding, grants remain subject to the Commonwealth Grants Rules and Guidelines (CGRGs). It is the administering entity's responsibility to inform the relevant minister of the necessary steps and timeframes required to comply with the CGRGs. This includes providing clear advice where government-identified projects or recipients do not align with grants program objectives or value for money.

- Commonwealth officials are required to act in a manner that is consistent with the *Public Service Act 1999*, the *Public Governance, Performance and Accountability Act 2013* and finance law. Commonwealth officials do not have discretion regarding the application of the mandatory provisions of the Commonwealth Grants Rules and Guidelines.

Governance and risk management

- Commonwealth officials must create and maintain an appropriate evidence base for advice to government. It is the responsibility of all Commonwealth officials to maintain records in accordance with information management standards.[44]

National Commuter Car Park Fund — a Commonwealth program

In 2021 the ANAO reported on its performance audit of the $660 million National Commuter Car Park Fund.[45] It is one component of the Urban Congestion Fund (UCF) that was established in the 2018–19 Budget. The whole report needs to be read to appreciate the nature and full extent of the deficiencies that ANAO identified, and what follows is just a

43 Ibid [9]–[10], [14].

44 Ibid 11 [19].

45 Auditor-General (Cth), *Administration of Commuter Car Park Projects within the Urban Congestion Fund — Department of Infrastructure, Transport, Regional Development and Communications* (Auditor-General Report No 47 2020–21, Australian National Audit Office, 28 June 2021) (ANAO Report No 47). For a summary see "Administration of Commuter Car Park Projects within the Urban Congestion Fund", *Australian National Audit Office* (Web Page, 28 June 2021) <https://www.anao.gov.au/work/performance-audit/administration-commuter-car-park-projects-within-the-urban-congestion-fund>.

selection. The ANAO found that allocations of funds were "not demonstrably merits based"[46] and that "[t]he assessment work underlying the department's advice to award funding to the selected projects was not to an appropriate standard".[47] One of the conclusions was:

> The department's approach to identifying and selecting commuter car park projects for funding commitment was not appropriate. It was not designed to be open or transparent. The department did not engage with state governments and councils, which increased the risk that selected projects would not deliver the desired outcomes at the expected cost to the Australian Government. Departmental advice did not contain an assessment against the investment principles or policy objectives and it was not demonstrated that projects were selected on merit. The distribution of projects selected reflected the geographic and political profile of those given the opportunity by the government to identify candidates for funding consideration.[48]

Concerning project identification and selection, the ANAO found:

> 19. The selection of 47 commuter car park sites for funding commitment were decisions of government taken over the period January to July 2019 and:
>
> - effected in 38 cases (81 per cent) by the written agreement of the Prime Minister to a written request from Ministers;
> - effected in seven cases (15 per cent) by the election commitment process; and
> - in two cases (four per cent) the department had not evidenced how the funding commitment was effected, beyond email advice from the Minister's Office and a media announcement by the Prime Minister.
>
> …
>
> 21. Neither the department's advice nor the recorded reasons for selection outlined each project's merits against the investment principles or how each project would contribute to achieving the policy objective of the UCF. As a result, there is little evidence to demonstrate that the selection of commuter car park projects was based on assessed merit against the investment principles or achievement of the policy objective.
>
> 22. Project distribution reflected the geographic and political profile of those given the opportunity to identify candidate projects for funding consideration. The approach to project identification included canvassing the Member of the House of Representatives for 23 electorates, as well as Coalition Senators or candidates for six electorates then held by the Australian Labor Party or Centre Alliance.
>
> 23. The distribution that resulted from the approach taken included that:
>
> - 64 per cent of projects were located in Melbourne, representing more than 2.5 times the number of projects located in Sydney notwithstanding that Infrastructure Australia has identified that the majority of the most congested roads in Australia are located in Sydney;
> - the Melbourne projects were predominantly located towards the South-East, whereas data shows that Melbourne's most congested roads in 2016, and as forecast in 2031, are predominantly in the North-West; and
> - nationally, 77 per cent of the commuter car park sites selected were in Coalition-held electorates and a further 10 per cent were in one of the six non-Coalition electorates canvassed.[49]

46 ANAO Report No 47 (n 45) 6 (Audit snapshot).
47 Ibid.
48 Ibid 8 [11].
49 Ibid 9 [19], [21]–[23] (footnote omitted).

One of the "key messages" identified as emerging from the audit for all Australian government entities was:

> Transparency, accountability and informed decision-making is supported by the making and keeping of records. This includes the creation of good quality information that contains sufficient detail to meet current business needs and that can be efficiently found and understood by others in the future.[50]

Bushfire Recovery Grants — a NSW Program

The NSW Auditor-General issued a report in February 2023 on a performance audit of a federal scheme for bushfire recovery grants.[51] That scheme involved three funding rounds, with the first funding round divided into fast-tracked projects and sector development grants. The findings of the Auditor-General included:

> Following requests from the Commonwealth Government in May and June 2020 to identify projects rapidly and as soon as practical, the department used an expedited process to identify relevant projects that had applied for other grants programs but had not received funding or which were identified as local priority projects. The department developed a set of guidelines for the Fast-Tracked stream based on draft Commonwealth funding criteria, but the department's guidelines lacked sufficient detail to ensure transparent and consistent decision-making. The guidelines also did not contain detailed information on how the assessment and approval processes would work. The department did not implement conflict of interest declarations for staff involved in the assessment process.
>
> The assessment process implemented for the Fast-Tracked stream deviated from the guidelines. For example, the guidelines did not set out a role for the then Deputy Premier or his office in the assessment process, but the Deputy Premier's office played a key role in project selection. At the direction of the Deputy Premier's office, a $1 million minimum threshold, not mentioned in the guidelines, was applied to projects, below which, projects would not be funded. This resulted in a number of shortlisted projects in areas highly impacted by the bushfires, including all shortlisted projects located in Labor Party-held electorates, being excluded without a rationale being documented at the time. The department advised that some of these projects were subsequently funded through other funding streams.
>
> The department's assessment process was inconsistent, poorly documented and lacked transparency. The department initially identified 445 potential projects through consultation with councils and through identifying projects that had been unsuccessful for other grant programs. The department only assessed 164 of these 445 projects for funding against the criteria in the guidelines. The department did not document the rationale for not assessing the remaining 281 projects against the criteria. The department also sought advice from Public Works Advisory (PWA) on whether projects could commence within six months, which was an eligibility criterion for the Fast-Tracked stream. PWA were only asked to assess 25 of the 445 projects, of which 19 were funded through the Fast-Tracked stream. The department also did not consistently follow PWA's advice and funded projects which PWA had advised were unable to commence within six months, which was not in line with the guidelines.[52]

50 Ibid 14 [33].
51 Auditor-General (NSW), *Bushfire Recovery Grants* (Performance Audit Report, Audit Office (NSW), 2 February 2023).
52 Ibid 4.